DOCKET

No. 08-1341

Title:	United States, Petitioner v. Glenn Marcus
Docketed:	May 1, 2009
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Nos.:	(07-4005-cr)
Decision Date:	August 14, 2008
Rehearing Denied:	December 8, 2008

Questions Presented

Date	Proceedings and Orders
Feb 26 2009	Application (08A747) to extend the time to file a petition for a writ of certiorari from March 8, 2009 to April 7, 2009, submitted to Justice Ginsburg.
Feb 27 2009	Application (08A747) granted by Justice Ginsburg extending the time to file until April 7, 2009.
Mar 25 2009	Application (08A747) to extend further the time from April 7, 2009 to May 7, 2009, submitted to Justice Ginsburg.
Mar 26 2009	Application (08A747) granted by Justice Ginsburg extending the time to file until May 7, 2009.
May 1 2009	Petition for a writ of certiorari filed. (Response due June 1, 2009)
May 21 2009	Order extending time to file response to petition to and including July 1, 2009.
Jul 1 2009	Brief of respondent Glenn Marcus in opposition filed.
Jul 15 2009	DISTRIBUTED for Conference of September 29, 2009.
Jul 15 2009	Reply of petitioner United States filed. (Distributed)
Oct 5 2009	DISTRIBUTED for Conference of October 9, 2009.
Oct 13 2009	Petition GRANTED. Justice Sotomayor took no part in the consideration or decision of this petition.
Nov 10 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including December 4, 2009.
Nov 10 2009	The time within which to file respondent's brief on the merits is extended to and including January 12, 2010.
Nov 20 2009	Motion to dispense with printing the joint appendix filed by petitioner United States.
Nov 30 2009	SET FOR ARGUMENT ON Wednesday, February 24, 2010.
Dec 4 2009	Brief of petitioner United States filed.
Dec 7 2009	Motion to dispense with printing the joint appendix filed by petitioner GRANTED. Justice Sotomayor took no part in the consideration or decision of this motion.
Dec 26 2009	CIRCULATED
Jan 5 2010	The time within which to file respondent's brief on the merits is further extended to and including January 19, 2010.
Jan 11 2010	Record received from U.S.C.A. for 2nd Circuit. (1 box)
Jan 11 2010	Record from U.S.D.C. for Eastern District of New York is electronic.
Jan 19 2010	Brief of respondent Glenn Marcus filed. (Distributed)
Feb 17 2010	Reply of petitioner United States filed. (Distributed)
Feb 24 2010	Argued. For petitioner: Eric D. Miller, Assistant to the Solicitor General, Department of

Justice, Washington, D. C. For respondent: Herald Price Fahringer, New York, N. Y.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

081341 MAY 1 - 2009

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GLENN MARCUS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals departed from this Court's interpretation of Rule 52(b) of the Federal Rules of Criminal Procedure by adopting as the appropriate standard for plain-error review of an asserted ex post facto violation whether "there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct."

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

GLENN MARCUS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 538 F.3d 97. The opinion and order of the district court (App., *infra*, 19a-64a) is reported at 487 F. Supp. 2d 289.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2008. A petition for rehearing was denied on December 8, 2008 (App., *infra*, 65a-66a). On February 27, 2009, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and in-

cluding April 7, 2009. On March 26, 2009, Justice Ginsburg further extended the time to May 7, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Ex Post Facto Clause of the United States Constitution (Art. I, § 9, Cl. 3) provides: "No * * * ex post facto Law shall be passed."

Federal Rule of Criminal Procedure 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, respondent was convicted of sex trafficking involving children or force, fraud, or coercion, in violation of 18 U.S.C. 1591(a)(1), and forced labor, in violation of 18 U.S.C. 1589. He was sentenced to 108 months of imprisonment. The court of appeals vacated respondent's convictions and remanded for further proceedings. App., *infra*, 1a-18a.

1. In 1998, respondent met a woman named Jodi in an online chat room devoted to bondage, dominance/discipline, submission/sadism, and masochism (BDSM).[1] In October 1998 and again in November 1998, Jodi traveled from her home in the Midwest to Maryland and met respondent, who lived in New York, at an apartment belonging to a woman named Joanna, who was one of respondent's "slaves." In January 1999, Jodi moved

[1] The district court permitted certain witnesses to testify using their first names only. App., *infra*, 2a n.1.

in with Joanna. Following that move, respondent visited Joanna's home every one to two weeks, during which he would engage in violent BDSM activity with Jodi, Joanna, and sometimes other women as well. App., *infra*, 2a-3a.

In October 1999, Jodi's relationship with respondent became nonconsensual. That month, Jodi told respondent that she wanted to terminate her relationship with him. In response, respondent inflicted the most severe "punishment" that Jodi had received to that point. App., *infra*, 3a; see *id.* at 26a-27a (describing incident).

In January 2000, respondent ordered Jodi to move to New York and live with a woman named Rona, another of respondent's "slaves." At respondent's direction, Jodi created a sexually explicit BDSM website called "Slavespace," and she worked between eight and nine hours per day on the website. Respondent received all revenues from the website, which consisted principally of membership fees and advertising. During this period, respondent continued to engage in violent and non-consensual sexual behavior with Jodi. When Jodi told respondent that she wanted to leave, he threatened to send pictures to her family and the media. App., *infra*, 4a.

In March 2001, respondent told Jodi that she would be allowed to leave him, but that she would first have to endure one final punishment. Respondent drove Jodi to the home of a woman named Sherry, where he banged Jodi's head against a ceiling beam, tied Jodi's hands and ankles to the beam, beat and whipped Jodi while she was hanging from the beam, drugged her, and had sexual intercourse with her. Respondent photographed the incident and forced Jodi to write a diary entry about it for his website. Jodi continued to live with Rona until

August 2001, when Jodi moved into her own apartment. At that point, Jodi's interactions with respondent became less frequent, although she remained in contact with him until 2003. App., *infra*, 4a-5a.

2. A grand jury charged respondent with, *inter alia*, sex trafficking involving children or force, fraud, or coercion, in violation of 18 U.S.C. 1591(a)(1), and forced labor, in violation of 18 U.S.C. 1589. App., *infra*, 5a. Both provisions were enacted as part of the Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. L. No. 106-386, 114 Stat. 1464, which became law on October 28, 2000. The superseding indictment, however, charged a course of conduct that occurred "between January 1999 and October 2001." App., *infra*, 5a-6a.

At trial, the government presented evidence about respondent's conduct both before and after the effective date of the TVPA. Respondent did not request an instruction that would have limited the jury's consideration or use of evidence pertaining to periods before the TVPA's enactment, and he likewise failed to raise this issue in his motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29. The jury found respondent guilty on both the sex-trafficking and forced-labor counts. App., *infra*, 6a.

3. The court of appeals vacated respondent's convictions and remanded for further proceedings in a per curiam opinion. App., *infra*, 1a-18a.

a. The court of appeals observed that respondent "argue[d] for the first time on appeal that the TVPA has been applied retroactively in his case in violation of the Ex Post Facto Clause of the United States Constitution." App., *infra*, 6a; see U.S. Const. Art. I, § 9, Cl. 3. The court stated that, "[b]ecause [respondent] failed to

raise this argument before the District Court, it is reviewed for plain error." App., *infra*, 6a; see Fed. R. Crim. P. 52(b).

The court of appeals concluded that "[t]his case * * * clearly implicates the Ex Post Facto Clause" because the jury was permitted to consider evidence of conduct that pre-dated the enactment of the TVPA in reaching its verdict. App., *infra*, 7a. Relying on its decision in *United States* v. *Torres*, 901 F.2d 205 (2d Cir.), cert. denied, 498 U.S. 906 (1990), the court of appeals further stated that, "even under plain error review" (App., *infra*, 8a), a defendant who was convicted after a trial at which evidence of both pre-enactment and post-enactment conduct was presented may obtain relief "whenever there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct." *Id.* at 10a. The court of appeals concluded that that standard was met here because the government had "concede[d]" that the jury heard "evidence * * * that established [that] all of the elements of" the sex-trafficking and forced-labor offenses were present before the effective date of the TVPA. *Id.* at 8a-9a.

b. Judge Sotomayor filed a concurring opinion, which Judge Wesley joined. App., *infra*, 10a-18a. In their view, the panel's conclusions were "compelled by the current law of this circuit." *Id.* at 10a. The concurring judges stated, however, that the Second Circuit's "precedent with regard to plain-error review of ex post facto violations does not fully align with the principles inhering in the Supreme Court's recent applications of plain-error review." *Id.* at 10a-11a. In particular, they emphasized that the *Torres* standard "appears to conflict with [*United States* v. *Cotton*, 535 U.S. 625 (2002)]

and [*Johnson* v. *United States*, 520 U.S. 461 (1997)]." *Id.* at 11a. Under those cases, "where there is no reasonable possibility that an error not objected to at trial had an effect on the judgment, the Supreme Court counsels us against exercising our discretion to notice that error." *Id.* at 14a. The Second Circuit's standard conflicts with that approach, the concurring judges stated, "because it requires a retrial whenever there is any factual possibility that a jury could have convicted a defendant based exclusively on pre-enactment conduct, even if such a scenario is highly implausible." *Ibid.* They also observed that the Second Circuit "has never directly addressed this possible conflict. *Ibid.* The concurring judges stated that "further guidance from the Supreme Court on this issue may be helpful, especially in light of the various plain-error standards applied by our sister circuits for ex post facto violations." *Id.* at 15a n.2 (citing cases).

The concurring judges concluded that the identification of the proper standard for reviewing respondent's forfeited ex post facto claim "affects the outcome of this appeal" with respect to respondent's forced-labor conviction. App., *infra*, 11a. On that count, they stated that "it is 'essentially uncontroverted' that [respondent's] relevant conduct was materially indistinguishable" during the pre-enactment and post-enactment periods and that respondent had offered no "explanation of how his pre- and post-enactment conduct differed in any relevant way." *Id.* at 17a-18a. The concurring judges thus saw "no reasonable possibility that the jury would have convicted [respondent on the forced-labor count] based only on his pre-enactment conduct," and they concluded that the error with respect to that count did not "seriously affect the fairness, integrity, or public reputation

of the judicial proceedings." *Id.* at 18a. Accordingly, those judges would have affirmed respondent's forced-labor conviction under what they believed to be this Court's standard for plain-error review.

4. The government filed a petition for rehearing, which the court of appeals denied. App., *infra*, 65a-66a.

REASONS FOR GRANTING THE PETITION

The Second Circuit has adopted an incorrect approach for determining when a criminal defendant may obtain relief on a forfeited claim that his conviction was based on conduct that preceded the enactment of the relevant statute. The court of appeals concluded that, "even under plain error review," reversal is mandatory "whenever there is *any* possibility, *no matter how unlikely*, that the jury could have convicted based exclusively on pre-enactment conduct." App., *infra*, 8a, 10a (emphases added). As the two concurring judges explained (*id.* at 10a-15a), that "any possibility" standard squarely conflicts with established law on plain error, which makes clear that a defendant who seeks relief on a forfeited claim bears the burden of establishing prejudice and that the defendant cannot prevail when prejudice is extremely unlikely.

The Second Circuit's approach conflicts with the decisions of other courts of appeals, and the correction of its error ultimately could warrant this Court's plenary review. But before this Court resorts to that step, an intermediate course is appropriate. The Court should grant this petition for a writ of certiorari, vacate the court of appeals' judgment, and remand for further consideration (GVR) in light of this Court's intervening decision in *Puckett* v. *United States*, 129 S. Ct. 1423 (2009). *Puckett* reaffirmed several bedrock propositions about

the nature of plain-error review, including the need for a defendant to show prejudice and the role of a reviewing court in determining whether the values of the judicial system warrant reversal. *Puckett* also makes clear that those principles are relevant and controlling in all plain-error cases. Because this Court's decision in *Puckett* "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam), a GVR is warranted.

A. The Court Of Appeals' Decision Conflicts With This Court's Decisions About The Scope Of Review Of Forfeited Claims

1. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Federal Rule of Criminal Procedure 52(b)—the plain-error rule—"tempers the blow of a rigid application of the contemporaneous-objection requirement," *United States* v. *Young*, 470 U.S. 1, 15 (1985), by "provid[ing] a court of appeals a limited power to correct errors that were forfeited because not timely raised in district court," *Olano*, 507 U.S. at 731. Rule 52(b) thus strikes a "careful balanc[e]" between "our need to encourage all trial participants to seek a fair and accurate trial the first time around [and] our insistence that obvious injustice be promptly redressed." *United States* v. *Frady*, 456 U.S. 152, 163 (1982).

Rule 52(b) imposes three "limitation[s] on appellate authority" to grant relief based on forfeited claims. *Olano*, 507 U.S. at 732. "[B]efore an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affects substantial rights.'" *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997) (quoting *Olano*, 507 U.S. at 732). When all three requirements are satisfied, "the court of appeals has authority to order correction, but is not required to do so." *Olano*, 507 U.S. at 735. Rather, a reviewing court "may * * * exercise its discretion to notice a forfeited error * * * only if (4) the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Johnson*, 520 U.S. at 467 (brackets in original) (citation omitted). Under the plain-error standard, "the tables are turned" from the harmless-error test, and a "defendant who sat silent at trial has the burden to show [both] that his 'substantial rights' were affected" and that the court of appeals' discretionary authority to correct the error should be exercised. *United States* v. *Vonn*, 535 U.S. 55, 62-63 (2002) (quoting *Olano*, 507 U.S. at 734-735).

2. As the concurring judges explained, this Court's decisions establish that Rule 52(b) does not authorize reviewing courts "to notice forfeited errors that did not affect the judgment." App., *infra*, 13a (citing *Johnson*, 520 U.S. at 470). In *Johnson*, the jury instructions in a perjury prosecution omitted the materiality element. 520 U.S. at 464. This Court determined that an error had occurred and that it was plain. *Id.* at 467-468. The Court also assumed for purposes of its decision that the error was "structural" in nature and that it affected the defendant's substantial rights. *Id.* at 468-469. But the Court held that "the [district] court's action in this case

was not 'plain error' of the sort which an appellate court may notice." *Id.* at 463. The Court explained that "the evidence supporting materiality was 'overwhelming,'" and that the defendant "ha[d] presented no plausible argument that the false statement under oath for which she was convicted * * * was somehow not material." *Id.* at 470. The Court determined that, under those circumstances, "there [was] no basis for concluding that the error 'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings'"; to the contrary, the Court stated that "it would be the reversal of a conviction such as this which would have that effect." *Ibid.* (brackets in original).

The Court applied the same analysis in *United States* v. *Cotton*, 535 U.S. 625, 632 (2002), where an indictment omitted a fact (drug quantity) that was necessary to authorize an increase in the defendants' maximum sentence. As in *Johnson*, the Court determined that a plain error had been made, and assumed for purposes of its decision that the error had affected the defendants' substantial rights. *Ibid.* The Court held, however, that "the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings" and thus did not satisfy the fourth prong of the *Olano* test. *Id.* at 632-633. The Court explained that "[t]he evidence that the conspiracy involved at least 50 grams of cocaine base was 'overwhelming' and 'essentially uncontroverted,'" and concluded that "[s]urely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base." *Id.* at 633.

3. In this case, the court of appeals concluded that, under its decision in *United States* v. *Torres*, 901 F.2d 205 (2d Cir.), cert. denied, 498 U.S. 906 (1990), it was

required to grant relief on respondent's forfeited ex post facto claim so long as there was "*any* possibility, *no matter how unlikely*, that the jury could have convicted based exclusively on pre-enactment conduct." App., *infra*, 10a (emphases added).[2] That standard is plainly inconsistent with the framework established in *Olano* and this Court's decisions in *Cotton* and *Johnson*, which make clear that a defendant may not obtain relief on a forfeited claim "where there is no reasonable possibility that" the unobjected-to error "had an effect on the judgment." *Id.* 14a (concurring opinion).

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[2] It is not clear that the error in this case is properly viewed as an ex post facto violation. The indictment charged, and the government's proof showed, a course of conduct that began before the enactment of the forced-labor statute and continued thereafter. Criminal statutes are presumed not to have retroactive effect, see *Johnson* v. *United States*, 529 U.S. 694, 701-702 (2000), and the government has not argued in this case that the TVPA criminalizes conduct that occurred before its enactment. If the TVPA does not criminalize respondent's pre-enactment conduct, it would not be an "ex post facto Law" (U.S. Const. Art. I, § 9, Cl. 3). But if the jury relied on non-criminal, pre-enactment conduct in reaching its verdict, then respondent may have been found guilty of a non-crime, which would appear to violate the Due Process Clause. See *Burge* v. *Butler*, 867 F.2d 247, 250 (5th Cir. 1989) (sentencing a defendant under a statute that did not apply to his crime because his conduct occurred before the statute's effective date violated due process).

The proper characterization of the error in this case, however, does not affect the plain-error analysis. In either case, the jury would have been given the option of finding respondent guilty on both a valid theory (post-enactment violation) or an invalid theory (pre-enactment violation). This Court's recent decision in *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008) (per curiam), makes clear that such alternative-theory errors are susceptible to harmless-error analysis, and they are susceptible to plain-error analysis as well. Accordingly, the panel's decision to apply an "any possibility" standard here is wrong, regardless of how the error is characterized.

As the concurring judges observed, the Second Circuit has "never directly addressed" the conflict between its decision in *Torres* and the decisions of this Court. App., *infra*, 14a. *Torres* was decided more than three years before *Olano*, more than seven years before *Johnson*, and more than 12 years before *Cotton*. In addition, the court of appeals "had no occasion to evaluate whether the *Torres* standard comports with *Johnson* and *Cotton*" in either *United States* v. *Harris*, 79 F.3d 223 (2d Cir.), cert. denied, 519 U.S. 851 (1996), or *United States* v. *Monaco*, 194 F.3d 381 (2d Cir. 1999), cert. denied, 529 U.S. 1028, and 529 U.S. 1077 (2000), because it concluded in both of those cases "that there was no error even under the *Torres* 'any possibility' standard." App., *infra*, 15a (concurring opinion).

In *Torres*, the Second Circuit stated that "errors of constitutional magnitude will be noticed more freely under the plain error rule than less serious errors." 901 F.2d at 228. This Court has made clear, however, that "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." *Johnson*, 520 U.S. at 466. The Court has repeatedly reaffirmed the "longstanding rule 'that a constitutional right may be forfeited,'" *Cotton*, 535 U.S. at 634 (quoting *Yakus*, 321 U.S. at 444), and it has applied the analysis outlined in *Olano* even to the violation of constitutional rights that "serve[] a vital function" and "act[] as a check on prosecutorial power," *ibid.*; accord *Johnson*, 520 U.S. at 466.

B. The Court Of Appeals' Decision Conflicts With The Decisions Of Other Courts Of Appeals

As the concurring judges explained, the courts of appeals have applied "various plain-error standards

* * * for ex post facto violations." App., *infra*, 15a n.2. As interpreted by the panel in this case, the Second Circuit's decision in *Torr* requires reversal "whenever there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct." *Id.* at 10a. The panel also concluded that that standard is satisfied whenever the evidence of pre-enactment conduct would have been legally sufficient to support a conviction, regardless of how "remote" the possibility "that the jury relied exclusively on pre-enactment conduct" in reaching its verdict. *Ibid.*; see *id.* at 8a-9a. Three other courts of appeals have refused to grant relief on forfeited claims that would have satisfied this standard.

1. In *United States* v. *Muñoz-Franco*, 487 F.3d 25 (1st Cir.), cert. denied, 128 S. Ct. 678, 128 S. Ct. 679, and 128 S. Ct. 682 (2007), the defendants argued for the first time on appeal that they were entitled to reversal of a bank fraud conviction because the jury "could have convicted them entirely on the basis of conduct that occurred prior to th[e] date" on which the statute was enacted. *Id.* at 54. The First Circuit agreed that the district court's failure to instruct the jury that it "must find that the conduct continued past the enactment date of the bank fraud statute" had been error and that the error was plain. *Id.* at 56.

The First Circuit then turned to the third and fourth prongs of the *Olano* test. The court declined to grant relief based on the forfeited error because it concluded that "no reasonable jury would have convicted [the defendants] based exclusively on conduct that occurred prior to the enactment date." *Muñoz-Franco*, 487 F.3d at 57. The court saw "nothing to differentiate [the defendants'] pre-enactment conduct from subsequent con-

duct," and concluded that it was "implausible that the jury would find [the] testimony [of certain key government witnesses] compelling only for events that occurred prior to" the statute's effective date. *Id.* at 57-58.[3] In this case, in contrast, the court of appeals rejected, as foreclosed by *Torres*, the government's argument "that [it] should not vacate [respondent's] convictions because it was a 'remote possibility' that the jury relied exclusively on pre-enactment conduct," App., *infra*, 10a, and it declined to attach significance to the fact that respondent's conduct with respect to the forced-labor count "was materially indistinguishable before and after the enactment of the [TVPA]," *id.* at 18a (concurring opinion).

2. In *United States* v. *Julian*, 427 F.3d 471 (7th Cir. 2005), cert. denied, 546 U.S. 1220 (2006), the question was whether the defendant was subject to an enhanced maximum penalty, which turned on whether his involvement in a conspiracy continued after the effective date

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[3] *Muñoz-Franco* observed that "other circuits have taken varying approaches to applying [the third and fourth] prongs of the plain error test in assessing a claimed ex post facto violation," but stated that it "need not settle on a rule" because it concluded that the defendants lost even under "[t]he plain error analysis used by the Second * * * Circuit[]." 487 F.3d at 56-57. But, unlike the Second Circuit panel in this case, *Muñoz-Franco* did not apply the *Torres* "any possibility" standard because it concluded that *Torres* "did not explicitly apply [plain error] review." *Id.* at 57 n.34. But see App., *infra*, 8a (panel majority stating that the *Torres* standard applies "even under plain error review"). Instead, *Muñoz-Franco* applied the test proposed by the concurring judges in this case—that is, whether "there [i]s a 'reasonable possibility' that the jury convicted [the defendants] solely on the basis of pre-enactment conduct." *Muñoz-Franco*, 487 F.3d at 57; accord App., *infra*, 14a (concurring opinion) (stating that a defendant must "demonstrat[e] a reasonable possibility that the jury might have convicted him or her based exclusively on pre-enactment conduct").

of a penalty-increasing statute. The Seventh Circuit concluded that, by not asking the jury to make that determination, the district court had violated the defendant's Sixth Amendment right to a jury trial, *id.* at 481-482, but it denied relief under the fourth prong of the plain-error test, *id.* at 483. The evidence in *Julian* was sufficient to support the conclusion that the defendant was a member of the conspiracy before the effective date of the penalty-increasing statute, *id.* at 481-483, and thus would have satisfied the test applied by the Second Circuit in this case. App., *infra*, 8a-10a. The Seventh Circuit denied relief in *Julian*, however, because it concluded that "no *reasonable* jury would have found that [the defendant] withdrew from the conspiracy prior to" the effective date of the penalty-increasing statute. 427 F.3d at 483 (emphasis added).

3. Like *Julian*, *United States* v. *Todd*, 735 F.2d 146 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985), involved the applicability of a penalty-increasing statute to a conspiracy that began before the statute's effective date. *Id.* at 149. In denying relief on the defendants' forfeited ex post facto claim, the court of appeals emphasized that all but two of the alleged overt acts "occurred during the effective period of the amendments," and it determined that "the record * * * clearly establishe[d] violations of the amended act * * * during the relevant time period." *Id.* at 150. Unlike the court of appeals in this case, the *Todd* court did not inquire whether the pre-enactment evidence alone would have been legally sufficient to support a conclusion.

C. The Court Of Appeals Should Be Permitted To Reconsider Its Decision In Light Of This Court's Intervening Decision In *Puckett* v. *United States*

For the reasons explained above, the Second Circuit's decision in this case conflicts with the decisions of this Court and other courts of appeals. Although this Court's plenary review may ultimately be warranted, the appropriate course at this point would be to grant certiorari, vacate the court of appeals' judgment, and remand for reconsideration in light of this Court's intervening decision in *Puckett* v. *United States*, 129 S. Ct. 1423 (2009).

1. In *Puckett*, this Court held that a forfeited claim that the government breached a plea agreement is subject to plain-error review under Federal Rule of Criminal Procedure 52(b). At the outset, the Court reaffirmed that the plain-error standard applies whenever a party has forfeited a claim by failing to raise it in the district court, *Puckett*, 129 S. Ct. at 1428, and that relief under that standard requires four showings: (1) an error, (2) that is obvious, (3) that affects substantial rights, and (4) that warrants relief as a matter of discretion, which should be exercised "only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 1429 (brackets in original) (quoting *Olano*, 507 U.S. at 736). The Court stated that, "in the ordinary case," an effect on substantial rights "means [that the defendant] must demonstrate that [the error] 'affected the outcome of the district court proceedings." *Ibid.* (quoting *Olano*, 507 U.S. at 734). *Puckett* also emphasized that "[a]ny unwarranted extension of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice" and that "the creation of an unjusti-

fied exception to the Rule would be [e]ven less appropriate." *Ibid.* (brackets in original) (citations omitted).

In elaborating on the third and fourth components of plain-error review, *Puckett* made two further points that underscore the error in the Second Circuit's analysis in this case. First, in discussing whether the defendant could carry his "usual burden of showing prejudice," *Puckett*, 129 S. Ct. at 1432, this Court rejected the view that it is enough for a defendant to show a speculative or theoretical possibility that he might have been better off in the absence of the error. Rather, the Court explained, "[t]he defendant whose plea agreement has been broken by the Government will not always be able to show prejudice," such as where the defendant "obtained the benefits contemplated by the deal anyway" or where the defendant "*likely would not have* obtained those benefits in any event." *Id.* at 1432-1433 (emphasis added). *Puckett* thus makes clear that a defendant who shows only that he *may* have been, but *likely* was not, prejudiced cannot carry his burden under the third prong of the *Olano* test. That conclusion is directly contrary to the Second Circuit's view that respondent was entitled to reversal of his convictions here "*no matter how unlikely*[] that the jury could have convicted based exclusively on pre-enactment conduct." App., *infra*, 10a (emphasis added).

Second, *Puckett* made clear that, regardless of whether a defendant has been able to satisfy the third prong of plain-error review, the fourth prong requires an additional, case-specific, inquiry. See 129 S. Ct. at 1433 ("The fourth prong is meant to be applied on a case-specific and fact-intensive basis."). Here, in contrast, the court of appeals proceeded directly from a finding of error (that is, a violation of the Ex Post Facto

Clause) to a conclusion that "a retrial [was] necessary," App., *infra*, 10a, without conducting any analysis of whether a failure to grant relief would seriously affect the fairness, integrity, or public reputation of judicial proceedings. Most notably, the court entirely failed to examine the evidence establishing the absence of any real possibility that the jury would have found guilt based solely on pre-enactment conduct or to consider respondent's failure "to offer any explanation of how his pre- and post-enactment conduct differed in any relevant way." *Id.* at 17a (concurring opinion). The Second Circuit thus failed to exercise discretion in the appropriate manner that *Puckett* reaffirmed.

2. Although they recognized the error in circuit law, the concurring judges felt bound to follow the Second Circuit's own previous decisions rather than those of this Court. App., *infra*, 18a (stating that respondent's conviction on the forced-labor count "should not be vacated," but joining in the per curiam opinion "because the *Torres* standard remains the law of this circuit"). The Second Circuit's general rule is that "one panel * * * cannot overrule a prior decision of another panel." *Consub Del. LLC* v. *Schahin Engenharia Limitada*, 543 F.3d 104, 109 (2d Cir. 2008). But the Second Circuit recognizes an exception for situations where "there has been an intervening Supreme Court decision that casts doubt on [its] controlling precedent." *Ibid.*

Puckett is an "intervening" decision because it was decided more than seven months after the panel's decision in this case. Although *Puckett* addressed the proper manner of conducting plain-error review in a different context, the Court's decision in that case, at a minimum, "casts doubt on" the panel's conclusion that respondent was not required to show any actual prejudice

in order to obtain relief, as well as the panel's failure to conduct any separate analysis under the fourth prong of the *Olano* test. As a result, there is at least "a reasonable probability" that the panel would reach a different result if this Court were to remand for further consideration in light of *Puckett*. *Chater*, 516 U.S. at 166-167.

Giving the panel an opportunity to revise its analysis in this case would serve an important purpose. To be sure, the kind of error at issue here may arise only infrequently and the need for this Court's clarification may not be as pressing as for some other plain-error issues, such as the one resolved in *Puckett*. But plain-error issues are of great systemic consequence, and the existence of a flawed approach to plain-error review in one context holds the potential to destablize plain-error doctrine more broadly. In recent years, this Court frequently has been required to explicate plain-error analysis in criminal cases. See *Puckett*, *supra*; *United States* v. *Dominguez-Benitez*, 542 U.S. 74 (2004); *Vonn*, *supra*; *Cotton*, *supra*; *Johnson*, *supra*; *Olano*, *supra*.

This Court should attempt to correct the Second Circuit's erroneous approach to plain-error review through a GVR rather than by plenary review. A "GVR order can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit [this Court's] plenary review." *Chater*, 516 U.S. at 168. The Second Circuit's decision in this case is out of step with the decisions of this Court and those of other circuits; two members of the panel called for correction of the error, yet the full court declined to rehear the case en banc; and an intervening decision of this Court reaffirms core plain-error principles that the circuit's current pre-

cedent ignores. In these circumstances, a GVR might well result in the panel concluding that the principles most recently reaffirmed in *Puckett* require a departure from the approach announced in *Torres* and applied in this case. That ruling would eliminate the need for this Court to expend its own scarce resources by hearing and resolving this case on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *Puckett* v. *United States*, 129 S. Ct. 1423 (2009).

Respectfully submitted.

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MAY 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 07-4005-cr

UNITED STATES OF AMERICA, APPELLEE

v.

GLENN MARCUS, DEFENDANT-APPELLANT

Aug. 14, 2008

Before: STRAUB, SOTOMAYOR and WESLEY, Circuit Judges.

Judges SOTOMAYOR and WESLEY concur in a separate opinion.

PER CURIAM:

Defendant-Appellant Glenn Marcus appeals from a September 18, 2007 judgment of conviction and sentence of the United States District Court for the Eastern District of New York (Allyne R. Ross, *Judge*), sentencing defendant principally to a term of 108 months' imprisonment following conviction after a jury trial of violations of the Trafficking Victims Protection Act ("TVPA"), 18 U.S.C. §§ 1589 and 1591. Marcus argues, *inter alia*, that his conviction amounted to a violation of the Ex Post Facto Clause of the Constitution. For the reasons set forth below, we agree. The judgment of the District

Court is vacated, and the case is remanded to the District Court for proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are exhaustively set forth in the District Court's opinion. *See United States v. Marcus*, 487 F. Supp. 2d 289, 291-97 (E.D. N.Y. 2007). We recite only those facts relevant to the Ex Post Facto challenge.

At trial, the government presented evidence that in 1998, Glenn Marcus, who was living in New York at the time, met Jodi,[1] the complaining witness, in an online chat room devoted to an alternative sexual lifestyle, known as bondage, dominance/discipline, submission/sadism, and masochism ("BDSM"). Marcus, with the help of two of his "slaves," Joanna and Celia, convinced Jodi to travel from her home in the Midwest to Joanna's apartment in Maryland, in order to meet Marcus in person, which she did in October 1998. During this visit, Marcus whipped Jodi and carved the word "slave" on her stomach with a knife. Jodi returned to Joanna's apartment in Maryland for a second visit in November 1998.

After her second visit, Marcus convinced Jodi to move from the Midwest to Maryland, where she would live with Joanna. Jodi submitted to Marcus a petition, in which she referred to herself as "pooch," a name given to her by Marcus, and stated, among other things, "I am begging to serve you Sir, completely, with no limitations. . . . If I beg you for my release, Sir, please ignore these words." Despite this petition, Jodi testified

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[1] At trial, the District Court granted the government's motion to allow witnesses to testify using their first names only. *See Marcus*, 487 F. Supp. 2d at 293 n.2.

that she believed she would be able to leave Marcus if she wanted to.

Jodi moved into Joanna's apartment in January 1999, and Marcus visited them in Maryland every one to two weeks. During these visits, Marcus engaged in BDSM activities with Jodi and Joanna, and sometimes other women. These activities included branding Jodi, requiring her to seek his permission before contacting her family, whipping and choking her during intercourse, photographing her for his website, "Subspace," and requiring her to post diary entries describing the activities on the website. The BDSM activity, along with the "punishments" for disobedience, increased in severity during this time, and Jodi testified that she became increasingly depressed.

At some point, Marcus instructed Jodi to convince her younger sister to travel to Maryland, and when she refused, Marcus told her that she would be severely punished. In October 1999, Marcus arrived in Maryland to inflict Jodi's punishment. He handcuffed her to a wall and left to take a nap, informing her that he would return to inflict the punishment. Jodi testified that at this point, she had a moment of clarity and decided to leave Marcus. She convinced Celia to help her off the wall, but Joanna awakened Marcus. Jodi told Marcus that she wanted to leave, and in response, Marcus inflicted upon Jodi the most severe punishment she had ever received up to this point. The incident was photographed for Marcus's website. Jodi testified that at this point, the relationship became non-consensual, as she felt "completely beaten down," "trapped," and "full of terror."

In November 1999, Joanna informed Marcus, by phone, that she wished to leave him. With Jodi listening on the line, Marcus threatened that he would show Joanna's pictures to her family and that he would harm members of her family if she were to leave him. Jodi testified that, as a result of having heard this conversation, she thought that Marcus would do the same to her were she to leave.

In January 2000, Marcus instructed Jodi to move to New York, where she lived with Rona, another one of Marcus's "slaves." Marcus instructed Jodi to create a new website, called "Slavespace." After creating the site, Jodi worked on it for approximately eight to nine hours per day, updating pictures and diary entries. Marcus received all site-related revenues, which consisted primarily of membership fees and advertising. During the time that Jodi lived with Rona, Marcus continued to engage in violent sexual behavior with her, punishing her severely when he was unhappy with her work on the website. Jodi testified that each of these incidents was non-consensual, but that she was afraid to leave him. At one point, when she told Marcus that she wanted to leave, he threatened to send pictures to her family and the media.

Finally, in March 2001, Marcus told Jodi that she would be allowed to leave him, but that she had to endure one final punishment. He drove her to the home of a woman named Sherry and there inflicted severe punishment upon Jodi, including banging her head against a beam in the ceiling of Sherry's basement, tying her hands and ankles to the beam, beating her and whipping her while she was hanging from the beam, drugging her, and having sexual intercourse with her. He photo-

graphed the incident and forced Jodi to write a diary entry about the incident for his website. Jodi continued to live with Rona until August 2001, when Rona told Marcus that she no longer wanted Jodi to live with her. Jodi moved into her own apartment, and her interactions with Marcus became less frequent, although she remained in contact with him until 2003.

On February 9, 2007, the government filed a superceding indictment, charging Marcus with violating the sex trafficking statute, 18 U.S.C. § 1591(a)(1),[2] and the forced labor statute, 18 U.S.C. § 1589,[3] of the Trafficking Victims Protection Act ("TVPA") "[i]n or about and be-

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[2] This section provides, in relevant part: "Whoever knowingly . . . in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, or obtains by any means a person . . . knowing that force, fraud, or coercion . . . will be used to cause the person to engage in a commercial sex act . . . shall be punished. . . . " 18 U.S.C. § 1591(a)(1). "The term 'commercial sex act' means any sex act, on account of which anything of value is given to or received by any person." 18 U.S.C. § 1591(c)(1). "The term 'coercion' means . . . threats of serious harm to or physical restraint against any person; . . . any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or . . . the abuse or threatened abuse of law or the legal process." 18 U.S.C. § 1591(c)(2).

[3] This section provides, in relevant part: "Whoever knowingly provides or obtains the labor or services of a person . . . by threats of serious harm to, or physical restraint against, that person or another person; . . . by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or . . . by means of the abuse or threatened abuse of law or the legal process, shall be [punished]." 18 U.S.C. § 1589.

tween January 1999 and October 2001." Marcus was convicted, after a jury trial, of both counts.[4]

Although the TVPA was not enacted until October 2000, the government presented evidence at trial with respect to the entire period charged in the indictment, and the District Court did not instruct the jury with respect to the date of the enactment of the statute. At the time, Marcus did not object to the jury instructions on this ground, and he did not raise any argument to this effect in his motion for a judgment of acquittal under Fed. R. Crim. P. 29.

DISCUSSION

Marcus argues for the first time on appeal that the TVPA has been applied retroactively in his case in violation of the Ex Post Facto Clause of the United States Constitution. Because Marcus failed to raise this argument before the District Court, it is reviewed for plain error. *See United States v. Torres*, 901 F.2d 205, 227-28 (2d Cir. 1990). "To establish plain error, the defendant must establish (1) error (2) that is plain and (3) affects substantial rights." *United States v. Villafuerte*, 502 F.3d 204, 209 (2d Cir. 2007). "If the error meets these initial requirements, we then must consider whether to exercise our discretion to correct it, which is appropriate only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* (internal quotation marks omitted).

The Constitution provides that "[n]o . . . ex post facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3.

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[4] The indictment also charged Marcus with obscenity in violation of 18 U.S.C. § 1462, and the jury acquitted him of that count. This portion of the jury's verdict has not been appealed.

> The Supreme Court has interpreted this clause as prohibiting Congress from passing a law that: (1) makes an act a crime that was legal when committed; (2) makes a crime greater than it was when it was committed; (3) increases the punishment for a crime after it has been committed; or (4) deprives the accused of a legal defense that was available at the time the crime was committed.

United States v. Harris, 79 F.3d 223, 228 (2d Cir. 1996). "While the Ex Post Facto Clause itself is a restraint on the legislative branch, its protections have been extended to the application of judicial precedent by the courts under the Due Process Clause of the Fifth Amendment." *Id.* at 228-29.

It is undisputed that the indictment charges Marcus with violating the statute between January 1999 and October 2001, that the government presented evidence at trial with respect to this entire time period, that the TVPA was enacted in October 2000, and that the District Court failed to instruct the jury with respect to this issue. This case, therefore, clearly implicates the Ex Post Facto Clause. However, the government argues that the sex trafficking and forced labor offenses constitute continuing offenses, and that even though the criminal conduct at issue began prior to enactment of the TVPA, it continued after enactment; accordingly, no violation occurred here. "It is well-settled that when a statute is concerned with a continuing offense, the Ex Post Facto Clause is not violated by application of a statute to an enterprise that began prior to, but continued after, the effective date of the statute." *Id.* at 229 (internal quotations marks and alterations omitted). Marcus argues

that the sex trafficking and forced labor offenses do not constitute continuing offenses.

We need not decide whether the offenses constitute continuing offenses for Ex Post Facto purposes because, even if they do, the convictions violate the Ex Post Facto Clause. In *Torres*, we stated that, even in the case of a continuing offense, if it was *possible* for the jury—who had not been given instructions regarding the date of enactment—to convict *exclusively* on pre-enactment conduct, then the conviction constitutes a violation of the Ex Post Facto clause. 901 F.2d at 229. *See also United States v. Monaco*, 194 F.3d 381, 386 (2d Cir. 1999) ("A conviction for a continuing offense straddling enactment of a statute will not run afoul of the Ex Post Facto clause unless it was possible for the jury . . . to convict *exclusively* on pre-enactment conduct.") (internal quotation marks omitted) (emphasis in original); *Harris*, 79 F.3d at 229 ("Because the [ ]statute is a continuing crime statute, we must determine whether it was possible for the jury . . . to convict Harris *exclusively* on pre-[ ] enactment conduct.") (emphasis in original). This is true even under plain error review. *See Torres*, 901 F.2d at 229 (holding under plain error review that, although it was unlikely that the jury had based its findings entirely on pre-enactment conduct, because such a scenario was a possibility, the defendant's conviction had to be vacated).[5] Here, the government concedes that "the jury

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[5] The government's reliance on *United States v. Duncan*, 42 F.3d 97, 104-05 (2d Cir. 1994), is misplaced. In *Duncan*, the jury was properly instructed on the Ex Post Facto Clause and was, in fact, required on the verdict form to find that an overt act in furtherance of the fraud or conspiracy had occurred after the effective date of the statute. Thus, there was no issue on appeal as to whether the jury had relied exclusively on pre-enactment conduct because it was undisputed that it had

could have found that Marcus violated Sections 1591 and 1589 solely by his conduct prior to their effective dates, because there was evidence before it that established all of the elements of these offenses as of that time." Specifically, the government concedes that before enactment of the statute: (1) Jodi moved from the Midwest to Maryland; (2) Jodi's relationship with Marcus became non-consensual; (3) Marcus threatened Joanna in Jodi's hearing; (4) Marcus forced Jodi to work on his existing website as well as create a new website; and (5) Jodi moved from Maryland to New York. Accordingly, the application of the TVPA in such a manner constituted an Ex Post Facto Clause violation, and the conviction must be vacated under our holding in *Torres*.[6]

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not. Accordingly, our holding in *Torres* was not implicated. Rather, the challenge in *Duncan* was whether, as a matter of law, the defendant's post-enactment conduct could be considered part of his criminal scheme (i.e., a continuation of the criminal venture), or whether the scheme had been fully executed before enactment of the statute. Thus, our holding was only that the convictions were not *barred* as a matter of law by the Ex Post Facto Clause. *See id.* at 105.

[6] Marcus also argues that the evidence presented at trial was insufficient to support his convictions. Although we are vacating the conviction on Ex Post Facto grounds, we nonetheless hold, for substantially the same reasons set forth in the District Court's opinion, that the totality of the evidence presented at trial was sufficient to support the convictions. *See, e.g., United States v. Meneses-Davila*, 580 F.2d 888, 896 (5th Cir. 1978) ("Since this ground of reversal permits the Government to retry defendant, we must reach defendant's sufficiency of the evidence argument, because the Government may not retry defendant if the evidence at the first trial was insufficient."); *United States v. Watson*, 623 F.2d 1198, 1200 (7th Cir. 1980); *United States v. McManaman*, 606 F.2d 919, 927 (10th Cir. 1979); *United States v. U.S. Gypsum Co.*, 600 F.2d 414, 416 (3d Cir.), *cert. denied*, 444 U.S. 884, 100 S. Ct. 175, 62 L. Ed. 2d 114 (1979); *United States v. Orrico*, 599 F.2d 113, 116 (6th Cir. 1979). We need not and do not decide whether only the post-enactment

The government argues that we should not vacate the convictions because it was a "remote possibility" that the jury relied exclusively on pre-enactment conduct; however, that argument is foreclosed by our decision in *Torres*, where we held that a retrial is necessary whenever there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct.[7]

CONCLUSION

For the foregoing reasons, we VACATE the judgment of the District Court. The case is REMANDED to the District Court for proceedings consistent with this opinion.

SOTOMAYOR, Circuit Judge, with whom Judge WESLEY joins, concurring:

Judge Wesley and I concur with the *per curiam* opinion because its conclusions are compelled by the current law of this circuit. We write separately because we believe this Court's precedent with regard to plain-error review of ex post facto violations does not fully align

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evidence was sufficient to sustain the convictions, because, even assuming it was not, double jeopardy would not bar retrial. *See, e.g., United States v. Mandel*, 591 F.2d 1347, 1371-74, *rev'd en banc on other grounds*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *United States v. Harmon*, 632 F.2d 812, 814 (9th Cir. 1980) (per curiam). We need not address the remainder of Marcus's arguments on appeal.

[7] We note that a serious question exists as to whether 18 U.S.C. § 1591 could constitute a continuing offense. The statute's plain language appears to require knowledge of "force, fraud, or coercion" at the time of the knowing recruitment, enticement, harboring or transport. We caution the government that, on remand, it may be well served by ensuring that the jury's instructions make clear that these elements are temporally aligned.

with the principles inhering in the Supreme Court's recent applications of plain-error review.

Under plain-error review, an appellate court cannot correct an error not raised at trial unless there is "(1) error, (2) that is plain, and (3) that affect[s] substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 467, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (internal quotation marks and citation omitted). In its recent applications of plain-error review, the Supreme Court has stated that where a trial court commits an error that is plain, that error does not seriously affect the fairness, integrity, or public reputation of the judicial proceedings if the error concerns an "essentially uncontroverted" issue. *United States v. Cotton*, 535 U.S. 625, 633, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002); *Johnson*, 520 U.S. at 470, 117 S. Ct. 1544. Our case law appears to conflict with this precedent because it requires a retrial whenever there is *any* possibility that an improperly instructed jury could have convicted a defendant based exclusively on conduct committed prior to the enactment of the relevant statute, *see United States v. Torres*, 901 F.2d 205, 229 (2d Cir. 1990), even where it is "essentially uncontroverted" that the defendant's relevant conduct before and after the statute's enactment was materially indistinguishable. We write to bring this issue to our Court's attention and to explain how this difference affects the outcome of this appeal.[1]

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[1] We note that our concern here applies only to our review of ex post facto violations under the plain-error standard.

In *Johnson*, the defendant was convicted of perjury under 18 U.S.C. § 1623. One element of that crime—the materiality of the defendant's false statement—was unconstitutionally decided by the trial judge, rather than by the jury. *See Johnson*, 520 U.S. at 463-64, 117 S. Ct. 1544; *see also United States v. Gaudin*, 515 U.S. 506, 522-23, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). The Supreme Court nevertheless affirmed the conviction, explaining that the error did not affect the fairness, integrity, or public reputation of the judicial proceedings because the evidence of materiality was "overwhelming" and "essentially uncontroverted." 520 U.S. at 469-70, 117 S. Ct. 1544. Because Johnson had "no plausible argument that the false statement under oath for which she was convicted . . . was somehow not material," the Supreme Court concluded there was no "miscarriage of justice" in not taking notice of the error. *Id.* at 470, 117 S. Ct. 1544.

Likewise, in *Cotton*, the defendants were convicted of conspiring to distribute and to possess with intent to distribute a detectable amount of cocaine and crack cocaine. The indictment, however, failed to allege drug quantity, a fact that increased the statutory maximum penalty, rendering the defendants' enhanced sentences unconstitutional. *See Cotton*, 535 U.S. at 632, 122 S. Ct. 1781; *see also Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) ("[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (internal quotation marks omitted)). Again, the Supreme Court held this error did not affect the fairness, integrity, or public reputation of the proceedings because the evidence that the drug conspiracy in-

volved at least 50 grams of cocaine base was "overwhelming" and "essentially uncontroverted." *Cotton*, 535 U.S. at 633, 122 S. Ct. 1781; *see also id.* ("Surely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base."). "The real threat . . . to the 'fairness, integrity, and public reputation of judicial proceedings,'" the Supreme Court explained, "would be if [the defendants], despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial." *Id.* at 634, 122 S. Ct. 1781.

These cases embody the Supreme Court's view that there is no "miscarriage of justice" in refusing to notice forfeited errors that did not affect the judgment. *See Johnson*, 520 U.S. at 470, 117 S. Ct. 1544. This is true even if the errors fall within the "limited class" of "structural errors" that "affect[ ] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 468, 117 S. Ct. 1544. We see no reason why this principle should not apply to the context of ex post facto violations. While the Ex Post Facto Clause is certainly fundamental to our notions of justice, *see Marks v. United States*, 430 U.S. 188, 191-192, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977), it is no more so than the Fifth and Sixth Amendment rights at issue in *Johnson* and *Cotton*. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) (describing the right to trial by jury in serious criminal cases to be "fundamental to the American scheme of justice").

Thus, where there is no reasonable possibility that an error not objected to at trial had an effect on the judgment, the Supreme Court counsels us against exercising our discretion to notice that error. Within the context of the Ex Post Facto Clause, we believe this means that where the evidence is "overwhelming" or "essentially uncontroverted" that the defendant's relevant pre- and post-enactment conduct is materially indistinguishable, such that a reasonable jury would not have convicted the defendant based solely on pre-enactment conduct, a retrial is unwarranted. In other words, the defendant must meet the low threshold of offering a plausible explanation as to how relevant pre- and post-enactment conduct differed, thereby demonstrating a reasonable possibility that the jury might have convicted him or her based exclusively on pre-enactment conduct. When this requirement is not met, the error does not seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

Our standard—announced in *Torres*, 901 F.2d at 229, and repeated in *United States v. Harris*, 79 F.3d 223, 229 (2d Cir. 1996), and *United States v. Monaco*, 194 F.3d 381, 386 (2d Cir. 1999)—appears to conflict with the *Cotton* and *Johnson* decisions because it requires a retrial whenever there is any factual possibility that a jury could have convicted a defendant based exclusively on pre-enactment conduct, even if such a scenario is highly implausible. Our Court has never directly addressed this possible conflict. Indeed, our opinion in *Torres* preceded the *Cotton* and *Johnson* decisions, and we did not apply the Supreme Court's current four-part plain-error analysis in crafting our standard. We have since had no occasion to evaluate whether the *Torres* standard comports with *Johnson* and *Cotton* because we

concluded in both *Monaco* and *Harris* that there was no error even under the *Torres* "any possibility" standard. Accordingly, our Court may wish to reexamine its precedent to ensure that it does not conflict with Supreme Court precedent.[2]

Were this Court to adopt a reasonable possibility standard, we believe that we should exercise our discretion to notice the forfeited ex post facto error for Glenn Marcus's sex-trafficking conviction, but not for his forced-labor conviction.[3] With regard to the sex-traf-

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[2] Whether or not we reexamine our precedent, further guidance from the Supreme Court on this issue may be helpful, especially in light of the various plain-error standards applied by our sister circuits for ex post facto violations. *See United States v. Munoz-Franco*, 487 F.3d 25, 57-58 (1st Cir. 2007) (noting the split in the circuit standards). For example, the Third Circuit has applied our standard from *Torres*, examining whether there is any possibility that the jury could have convicted the defendant based exclusively on pre-enactment conduct. *See United States v. Tykarsky*, 446 F.3d 458, 481-82 (3d Cir. 2006). The First Circuit, however, has held that a retrial is unwarranted where there was "nothing to differentiate appellants' pre-enactment conduct from subsequent conduct" and thus "a reasonable jury would not have convicted the appellants based solely on pre-enactment conduct." *Munoz-Franco*, 487 F.3d at 57-58. Similarly, the Seventh Circuit, in a continuing conspiracy case, explained its plain-error standard as whether a reasonable jury, properly instructed on this point, could have concluded that the conspiracy had ended before the relevant date or that the defendant had withdrawn from the conspiracy before that date. *See United States v. Julian*, 427 F.3d 471, 482-83 (7th Cir. 2005). Finally, the Fifth Circuit has examined whether the bulk of the evidence focused on events occurring after the enactment of the statute. *See United States v. Todd*, 735 F.2d 146, 150 (5th Cir. 1984).

[3] As explained in the *per curiam* opinion, Marcus was convicted of sex trafficking, 18 U.S.C. § 1591, and forced labor, 18 U.S.C. § 1589, based on his conduct from January 1999 until October 2001. Neither of these statutes was effective until October 28, 2000. As a result, the dis-

ficking conviction, Marcus's relevant conduct differed materially before and after October 2000, such that there is a reasonable possibility that the jury may have convicted him based exclusively on pre-enactment conduct. The sex-trafficking statute makes it illegal to knowingly, in or affecting interstate commerce, recruit, entice, harbor, transport, provide, or obtain by any means a person knowing that force, fraud, or coercion will be used to cause the person to engage in a commercial sex act. 18 U.S.C. § 1591. The government alleged that Marcus engaged in several trafficking activities with the requisite mens rea: (1) that he recruited, enticed, and obtained Jodi when he met her online in late 1998; (2) that he transported Jodi from Maryland to New York in January 2000; and (3) that he harbored Jodi from 1999 until 2001. Only the harboring activity occurred after the October 2000 effective date of the statute. Thus, if the jury concluded that Marcus did not harbor Jodi within the meaning of the statute,[4] but did

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trict court's failure to instruct the jury that Marcus could not be convicted based on his conduct before this date was plainly erroneous in light of the Ex Post Facto Clause's prohibition against making an act a crime that was legal when committed, *see Harris*, 79 F.3d at 228. Because the government presented evidence that Marcus had fulfilled all the elements of both crimes before October 2000, thus making it factually possible that the jury could have convicted him based exclusively on pre-enactment conduct, we must vacate both convictions under *Torres*.

[4] We note that the evidence of harboring was not "overwhelming." While it is undisputed that Marcus set Jodi up with a place to live at his friend's apartment in New York from January 2000 until 2001, Marcus never personally provided Jodi with housing, and the jury could have found that his actions did not amount to harboring. Alternatively, the jury may have never reached this issue, instead basing its findings on other alleged trafficking activities.

recruit, entice, or obtain her in 1998 or transport her in 2000, it would have convicted him based only on pre-enactment conduct. This material difference in conduct demonstrates a reasonable possibility that the jury may have relied exclusively on pre-enactment conduct. Under such circumstances, a retrial is necessary.

In contrast, with respect to the forced-labor conviction, Marcus has no plausible argument as to why the jury would have differentiated between his conduct before and after the enactment of the statute. Here, the government alleged that from January 2000 until at least the spring of 2001, Marcus forced Jodi, through threat of serious physical harm and actual physical harm, to create and maintain a commercial BDSM website. Jodi testified that throughout this time period she was forced to work eight to nine hours a day maintaining the website and that Marcus would punish her whenever she failed to update the site quickly enough.[5] Marcus has been unable to offer any explanation of how his pre- and post-enactment conduct differed in any relevant way.[6] Indeed, his central argument on the forced-labor charge appears to be that "because of the volatile evidence in the sex trafficking prosecution, which included the admission of highly prejudicial photographs and graphic images, there was a very serious spillover impact on the forced labor charges." Because it is "essentially uncontroverted" that Marcus's relevant conduct

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[5] In fact, the government presented evidence that one of the most severe punishments Marcus imposed on Jodi for her work on the website occurred in April 2001.

[6] Marcus notes that Jodi designed the website before the enactment of the statute and only maintained the site after the effective date. This distinction, however, is immaterial for purposes of the forced-labor statute.

was materially indistinguishable before and after the enactment of the statute, there is no reasonable possibility that the jury would have convicted him based only on his pre-enactment conduct and not on his post-enactment conduct. In other words, a rational jury would have either convicted Marcus for his conduct during this entire period or not at all. Because the district court's error in failing to instruct the jury on the Ex Post Facto Clause did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings, his conviction should not be vacated for this error.

Nevertheless, we join the *per curiam* opinion in vacating both of Marcus's convictions because the *Torres* standard remains the law of this circuit. *See Bd. of Educ. v. Hufstedler*, 641 F.2d 68, 70 (2d Cir. 1981) ("A panel of this court is bound by a previous panel's opinion, until the decision is overruled en banc or by the Supreme Court."). For the reasons discussed, however, we believe that our precedent warrants reexamination.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

No. 05-CR-457 (ARR)

UNITED STATES OF AMERICA

v.

GLENN MARCUS, DEFENDANT

May 17, 2007

OPINION AND ORDER

ROSS, United States District Judge.

Defendant Glenn Marcus was tried before a jury on charges of sex trafficking, in violation of 18 U.S.C. § 1591; forced labor, in violation of 18 U.S.C. § 1589; and dissemination of obscene materials through an interactive computer service, in violation of 18 U.S.C. § 1462. The charges arose out of conduct related to an alternative sexual lifestyle, known as bondage, dominance/discipline, submission/sadism, and masochism ("BDSM"). At trial, the complaining witness testified that she entered into a consensual BDSM relationship with the defendant, who subsequently used force and coercion to prevent her from leaving when she sought to do so. She testified that she remained with the defendant against her will for nearly two years, during which period she

created and maintained the defendant's website and engaged in BDSM conduct with the defendant and others that was photographed and placed on the website. On March 5, 2007, a jury found the defendant guilty of sex trafficking and forced labor and not guilty of dissemination of obscene materials. The jury also found that the government had proved the defendant committed aggravated sexual abuse in relation to the forced labor count, a statutory aggravating factor.

Defendant now renews his Fed. R. Crim. P. 29 motion for judgment of acquittal on the sex trafficking and forced labor counts, which he made initially at the close of the government's case and renewed at the end of all the evidence. The defendant raises three grounds for setting aside his conviction. First, he contends that the Trafficking Victims Protection Act of 2000 ("TVPA")—the legislation enacting both statutes at issue—was not intended to apply to conduct that took place as part of an "intimate, domestic relationship" or to consensual BDSM activities. Second, he claims that the term "commercial sex act" in 18 U.S.C. § 1591 does not apply when the defendant received revenue for photographic depictions of sex acts as opposed to the acts themselves. Third, he argues that the government has failed to present sufficient evidence for a reasonable jury to find a nexus between the force or coercion employed by the defendant and the commercial sex act element of his sex trafficking conviction or the labor or services element of his forced labor conviction. In the alternative, defendant moves for a new trial pursuant to Fed. R. Crim. P. 33 so that the jury may be instructed that a conviction requires that the dominant purpose of the defendant's use of force or coercion is to cause the victim to engage in a commercial sex act or to obtain her labor or ser-

vices. For the reasons stated below, the defendant's motions are denied.

BACKGROUND

Viewing the evidence in the light most favorable to the government, *see United States v. Autuori*, 212 F.3d 105, 108 (2d Cir. 2000), the relevant evidence adduced at trial is as follows.[1]

1. Events from 1998 to June 1999

In 1998, Jodi,[2] the complaining witness, learned about BDSM on the internet and began visiting online chatrooms to find out more information. (Trial Transcript [hereinafter "Tr."] at 70-71.) At the time, Jodi understood BDSM to be a type of relationship in which, within certain guidelines and limits, one person is dominant and the other submissive. (*Id.*) After two rela-

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[1] As the defendant's Rule 29 motion was initially made at the close of the government's case and the court reserved its ruling, the defendant's challenge to the sufficiency of the evidence is reviewed based on the evidence presented during the government's case-in-chief. *See* Fed. R. Crim. P. 29(b); *Autuori*, 212 F.3d at 108. Insofar as evidence subsequently presented is relevant to the disposition of the defendant's Rule 33 motion, such evidence will be reviewed separately in the course of deciding that motion.

[2] By opinion and order dated January 31, 2007, the court granted the government's motion to allow the complaining witness and one additional witness to testify at trial using only their first names due to the explicit nature of the conduct about which they would be testifying and the likelihood of damaging publicity. Prior to trial, the defendant and the government agreed that the same accommodation would be granted to defense witnesses and any other individuals whose names would be mentioned at trial in connection with sexually explicit conduct. Accordingly, the complaining witness will be referred to as "Jodi" for the purposes of this opinion. Likewise, the court will identify by first name those individuals who were referred to in that manner at trial.

tively brief BDSM relationships, Jodi met the defendant online in the fall of 1998. (*Id.* at 71-73.) The defendant —Identified by the screen name "GMYourGod"—called himself the only true "master" and referred to the women in BDSM relationships with him as "slaves" who "served" him. (*See id.* at 73, 75-76.) He explained to Jodi that, in the type of BDSM he practiced, he did not allow the use of any limits or safe words.[3] (*Id.* at 74.) By way of example, he explained that he could decide to cut off a slave's limb or order her to kill a small child. (*Id.* at 74-75.) Two of the defendant's slaves involved in the online conversation—Joanna, identified by the screen name "GMsdogg," and Celia, identified by the screen name "nameless"—assured Jodi that the defendant had never engaged in behavior of this nature previously, and Joanna told Jodi that she did not believe he would do so in the future. (*Id.* at 75.) In subsequent conversations by telephone, the defendant communicated to Jodi that she belonged to him and needed to serve him. (*Id.* at 75-76.) During these early encounters with the defendant, Jodi shared intimate details about her life experiences, including that she had been physically and emotionally abused by her mother and had struggled with an eating disorder. (*See id.* at 76-77.)

In October 1998, Jodi traveled from her home in the Midwest[4] to Joanna's apartment in Maryland to meet the defendant. (*Id.* at 76.) Over the three to four days

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[3] At trial, Jodi explained that a safe word is a word used by an individual in a submissive position when that person wants to stop an event that is taking place. (Tr. at 71.)

[4] The government and the defendant agreed prior to trial that, in the interests of protecting Jodi's privacy, they would not ask Jodi to disclose the exact location of her home or current geographical whereabouts. (*See* Tr. of 11/20/07 Tel. Conf., at 196.)

that she was there, the defendant whipped her and carved the word "slave" on her stomach with a knife. (*Id.*) In November 1998, Jodi again traveled to Maryland to meet the defendant. (*Id.* at 77.) During these two visits, the defendant complimented Jodi on her looks and performance of BDSM activities. (*Id.* at 77-78.) He also continued to emphasize that she belonged to him and needed to be with him. (*Id.*)

After Jodi's second visit, the defendant informed her that he wanted her to move to Joanna's apartment in Maryland and Jodi agreed to do so. (*Id.* at 78.) Prior to moving, Jodi submitted a petition, which she drafted and Joanna edited, in which she asked the defendant to allow her to serve him as his slave. (*Id.* at 79-81; *see also* Govt. Ex. 2C,[5] at 1051.) In the petition, she referred to herself as "pooch" (Govt. Ex. 2C, at 1051), a name given to her by the defendant to signify that she was his property (Tr. at 82.) In relevant part, the petition read: "I am begging to serve you Sir, completely, with no limitations. . . . If I beg you for my release, Sir, please ignore these words." (Govt. Ex. 2C, at 1051.) Despite this request, however, Jodi believed that she would be able to leave if she wanted to do so, because the defendant had previously told her that he never wanted to have a slave who did not want to serve him. (*See* Tr. at 108.)

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[5] Government Exhibit 2C is a binder containing excerpts from the Slavespace website that were admitted into evidence on the sex trafficking and forced labor counts. (*See* Tr. at 80.) These excerpts were taken from an Adobe Acrobat document containing a version of the Slavespace website captured by a federal agent in April 2005. (*See* Tr. at 421-23, 431; Govt. Ex. 2A.) At the defendant's request and with the government's consent, the court admitted into evidence the diary entries contained in the binder without instructing the jury that they were not admitted for their truth. (*See* Tr. 61-68; 100-01.)

In January 1999, Jodi moved to Maryland, where she stayed with Joanna in Joanna's apartment. (*Id.* at 83, 86.) The defendant, who lived in Long Island, New York at the time (*id.* at 75), would visit Joanna's apartment every one to two weeks for three to four days (*id.* at 86-87). During these visits, he would engage in BDSM activities with Jodi, Joanna and sometimes other women. (*Id.*) When the defendant was present, Jodi and any other women present were not allowed to wear clothing, could not eat, drink or speak without permission, were only allowed to sleep for a couple of hours at a time, and were expected to follow the defendant's instructions. (*Id.* at 87.) Soon after Jodi arrived, the defendant took steps to reinforce the notion that he considered Jodi to be his property, including shaving her head and branding a "G" into her buttocks with a coat hanger. (*See id.* at 83-84.) The branded skin subsequently developed into a severe burn, but the defendant did not permit Jodi to seek medical attention. (*Id.* at 86.) The defendant also prohibited Jodi from maintaining any of her prior friendships and required her to receive permission from him to speak with her family. (*Id.* at 83-84.) He told her that she was ugly, stupid, and disobedient and did not deserve to be his slave. (*Id.* at 87-88.) Jodi called the defendant "sir," while he referred to her as "it," "pooch" or by other derogatory names and expected her to refer to herself only in the third person. (*Id.* at 88.)

The defendant instructed Jodi to engage in a series of BDSM activities with him and other women, which the defendant photographed and posted on a website maintained by Joanna known as "Subspace." (*Id.* at 91-93.) For example, Jodi was whipped, choked, and had sexual intercourse while tied to a wall. (*Id.* at 90.) At the time, Jodi found some of these activities to be sexually gratify-

ing. (*Id.*) She and the other women were required to write diary entries to post on the defendant's website describing the BDSM activities they engaged in with the defendant and expressing the joy and gratitude the "slaves" felt about serving their "master." (*Id.* at 91.)

When the defendant was not present at the apartment, Jodi and Joanna were expected to ensure that each was complying with his instructions. (*Id.* at 93-94.) For example, they were told to recite daily the "Master's Expectations," which outlined the expected conduct of the defendant's slaves. (*Id.* at 94-95; *see also* Govt. Ex. 2C, at 1014-20.) The defendant would also direct Joanna or Jodi to wear butt plugs[6] or breast clamps for long periods of time. (*Id.* at 95.) If either failed to follow instructions, the other one would inform the defendant and he would either administer punishments himself or order one to punish the other. (*Id.* at 96.) Jodi was punished nearly every time she saw the defendant, including being whipped or placed in a large, metal dog cage in the apartment. (*Id.* at 97-98.)

Several months after Jodi began living at Joanna's apartment, the punishments inflicted by the defendant became increasingly severe, and Jodi began feeling depressed. (*Id.* at 98.) In June 1999, she burned her arm twice with a cigarette. (*Id.*) Fearing that the defendant would notice the burns when he visited from New York, she told him on the telephone what she had done. (*Id.*) He instructed Joanna to burn herself with a cigarette on her arm and then to punish Jodi by defecating on her face in the bathtub and making her clean the bathtub with her tongue. (*Id.*; Govt. Ex. 2C, at 299, 307.) When

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[6] Jodi described a butt plug as "an implement that's shaped like a penis and inserted in [the] anus." (Tr. at 95.)

the defendant arrived at Joanna's apartment, he slapped Jodi so hard she was "seeing stars." (Tr. at 99.) He then burned her with a cigarette all over her body, including her forehead, arms, the bottom of her feet, the back of her neck, and inside her vagina. (*Id.* at 99-100.) Jodi testified that "I felt like I was literally in hell" and "like I was on fire; I couldn't put it out." (*Id.* at 100.) While Jodi was miserable because she believed she had disappointed the defendant, she continued to remain in the relationship because she believed she could do better and that she belonged with him. (*Id.* at 103.)

2. Events from October 1999 to August 2001

At some point, the defendant instructed Jodi to convince her younger sister to travel to Maryland to visit and, when she arrived, to drug her with "ruffies" [7] so the defendant could rape her. (*See id.* at 103-04.) Jodi was also directed to use the internet to recruit a new slave to join them in Maryland. (*Id.* at 104.) Because Jodi refused to complete the first task and was unsuccessful with the second, the defendant told her that, the next time he visited, she would be so severely punished that she might not be able to work for some time afterwards. (*Id.* at 104, 207; Govt. Ex. 31.)

In October 1999, the defendant arrived in Maryland, where he handcuffed Jodi to the wall and told her that he would punish her after he took a nap. (Tr. at 104.) While she was on the wall, Jodi testified that she had a moment of clarity and decided that she wanted to leave. (*Id.* at 104-5.) She told Celia, another woman serving

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[7] The term "ruffies" is slang for the drug Rohypnol, which is also known as the "date rape drug." *See U.S. v. Martinez-Martinez*, 369 F.3d 1076, 1078 n.1 (9th Cir. 2004).

the defendant, and Celia helped her get down. (*Id.* at 105.) Joanna awakened the defendant, who ordered that Jodi be returned to the wall. (*Id.*) When Jodi informed the defendant that she wanted to leave, he told her to shut up. (*Id.*) He then put a whiffle ball inside her mouth, closed her lips shut with surgical needles so that she was unable to speak, and placed a hood over her head. (*Id.* at 105-7.) While she was on the wall, he whipped and beat her with a cane extremely hard for an extended period of time and had sexual intercourse with her. (*Id.* at 106.) The defendant then took Jodi off the wall and attached her with handcuffs to a flat board, at which point he attempted to sew Jodi's vagina closed using a sewing needle and thread, only stopping when the needle broke. (*Id.* at 106-7.) A butt plug was inserted into her anus (Govt. Ex. 2C, at 369, 1223), and the defendant used a knife to carve his initials into the soles of her feet (Tr. at 107). While this incident was taking place, Jodi was crying and screaming. (*Id.* at 107.) The abuse was photographed and Jodi had to write a diary entry about it, and these were placed on the defendant's website. (*See* Tr. at 109; Govt. Ex. 2C at 365-74, 1217-24.) This was the most extreme punishment to which Jodi had ever been subjected. (Tr. at 123.) Prior to this experience, Jodi believed that she would be able to leave any time she wished. (*Id.* at 108.) However, after this episode, Jodi testified that she felt "completely beaten down," "trapped and full of terror." (*Id.* at 108.) She no longer wished to be involved with the defendant and remained with him only out of fear . (*Id.* at 170.)

In November 1999, Joanna told the defendant that she no longer wanted to serve him. (*Id.* at 125.) While both Jodi and Joanna were on the telephone with the

defendant, he threatened to send photographs and a videotape of Joanna engaged in sexually explicit behavior to her father and to kill her godson if Joanna did not continue to serve him. (*Id.* at 127-29; *see* Govt. Ex. 12.) As a consequence, Jodi became terrified that, if she attempted to leave the defendant, he would send pictures to her family or harm one of her family members. (Tr. at 128.)

In January 2000, the defendant instructed Jodi to move to New York and stay at the apartment of a woman named Rona, who, Jodi was told, had been his slave since she was 13 years old. (*Id.* at 134.) As Joanna had taken down the Subspace website, the defendant told Jodi to create and manage a new BDSM website entitled "Slavespace." (*Id.*) After creating the website, Jodi worked on it approximately eight to nine hours a day, updating photographs and diary entries and clicking on banner advertisements to increase revenue and enhance its visibility on the internet. (*Id.* at 148-49.) Although she did not want to work on the website, she continued to do so because she was terrified of the consequences if she refused. (*Id.* at 149.) The defendant punished Jodi if she failed to post diary entries or pictures quickly enough or if the website made less money than he expected. (*Id.*) In April 2001, when the defendant was displeased with Jodi's work on the website, he put a safety pin through her labia and attached a padlock to it, closing her vagina. (*Id.* at 150-51.) In an attempt to stop Jodi from screaming and crying during this incident, Rona put a washcloth in Jodi's mouth and the defendant whipped her with a knife. (*Id.*) The defendant photographed this incident and the pictures were placed on the Slavespace website. (*See* Govt. Ex. 2C, at 543, 546-50.)

All revenues made from the website went to the defendant. (Tr. at 153.) The website had a section available exclusively to members, for which fees of approximately $30 per month were charged. (*Id.* at 145, 148.) The defendant made several hundred dollars per month from the member section of the site and an additional several hundred dollars from advertising. (*Id.* at 149-50, 153; Govt. Ex. 23.)

During this period, the defendant continued to punish Jodi severely. For example, he once whipped Jodi so hard that she vomited. (Tr. at 154.) He also held a plastic bag over her head until she passed out. (*Id.* at 155.) In another incident, he zipped Jodi into a plastic garment bag and choked her through the plastic. (*Id.* at 156). Each of these incidents was non-consensual and each was photographed for the website. (*Id.* at 154-57.) However, Jodi continued to stay with the defendant because she was terrified of his reaction if she left and feared that he might publicly expose her. (*Id.* at 158.) At one point, when she expressed to him how unhappy she was, the defendant threatened to send photographs of her to her family and the media. (*Id.* at 158-59.)

In March 2001, Jodi called the defendant and told him that she wanted to leave, and he told her that she would first have to endure one final punishment. (*Id.* at 159-60.) Even though she was terrified, she agreed to do so because she feared the consequences if she did not comply. (*Id.* at 159-60.) The defendant drove her to the Long Island residence of a woman named Sherry, instructed her to take off her clothes, and then directed her to go to the basement. (*Id.*) As she was descending to the basement, Jodi realized that she could not go through with the punishment and the defendant forced

her to go down the stairs. (*Id.* at 161.) Jodi started to scream and the defendant banged her head against a beam in the basement, bound her hands and ankles and attached her to the beam. (*Id.* at 161-62.) He then beat and whipped her for over an hour. (*Id.* at 162, 165.) While he was beating her, he told her that she belonged to him and needed to serve him. (*Id.* at 165) At various times, he removed the chair or box under her feet so that she was suspended from the ceiling by the ropes. (*Id.* at 162, 164.) He made her take a *valium* (*id.* at 164; Govt. Ex. 28) and put a large surgical needle through her tongue (Tr. at 164). Jodi continued to try to scream, even with the needle in her tongue. (*Id.* at 164.) The defendant then left her suspended for half an hour or 45 minutes, until her feet and hands became completely numb. (*Id.* at 165.) After letting her down, he took her to a bedroom and had sexual intercourse with her. (*Id.* at 166.) The defendant photographed Jodi throughout the punishment and forced her to write a diary entry about it to post on his website. (*See id.* at 165-67; Govt. Ex. 2C at 531-34, 536, 538, 540.) Jodi testified that, after this incident, she felt broken and terrified and as if there was no way she would be able to leave the relationship. (Tr. at 168.) She continued to live in Rona's apartment until August 2001. (*Id.* at 172.)

3. Events from August 2001 to 2003

In August 2001, Rona communicated to the defendant that she did not want Jodi to live in her apartment any longer, and the defendant allowed Jodi to move out. (*See id.*) When Jodi obtained her own apartment, her interactions with the defendant became less frequent and less extreme. (*Id.* at 173.) However, she continued to stay involved with the defendant in order to maintain

a semblance of control over his use of her pictures on the website. (*Id.* at 173, 175.) During this time period, the defendant posted diary entries on the website exposing personal information that Jodi had told him about her family. (*Id.* at 174; Govt. Ex. 2C, at 703-05.) He also posted a "Find Pooch" contest on his website, offering a free membership to any person who photographed her on the street, and he provided information as to Jodi's whereabouts and the location of her apartment. (Tr. at 175, 186; Govt. Ex. 2C, at 3907, 3909.) Jodi maintained contact with the defendant until 2003. (*Id.* at 176.)

DISCUSSION

I. Rule 29 Motion

The defendant asks the court to set aside his convictions under Rule 29, contending that (1) the rule of lenity requires that the sex trafficking and forced labor statutes be construed narrowly and, therefore, are inapplicable to the conduct at issue; (2) the sex trafficking statute does not apply when the victim is coerced into pornography as opposed to prostitution; and (3) the evidence is insufficient to show a nexus between the defendant's conduct and the commercial sex act element of the sex trafficking statute or the labor or services element of the forced labor statute.

A. Standard of Review

A defendant seeking a judgment of acquittal on the ground that the evidence was insufficient bears a heavy burden. *United States v. Russo*, 74 F.3d 1383, 1395 (2d Cir. 1996). The court must "consider the evidence in its totality, not in isolation, and the government need not negate every theory of innocence." *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000). The court must

also give deference to the jury's assessment of the credibility of the witnesses and to its selection among competing inferences. *United States v. Pelaes*, 790 F.2d 254, 259 (2d Cir. 1986). "The court must be careful to avoid usurping the role of the jury," *Autuori*, 212 F.3d at 114 (citation and internal punctuation omitted), and must not substitute its own determination of credibility or relative weight of the evidence for that of the jury. *Id.* "If the court concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, the court must let the jury decide the matter." *Id.* (citation and internal punctuation omitted). A conviction challenged on sufficiency grounds will be affirmed if, viewing all the evidence in the light most favorable to the prosecution and drawing all reasonable inferences in its favor, a reviewing court finds that "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "[T]he court may enter a judgment of acquittal only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999) (citation and internal quotation marks omitted).

B. Applicability of the Trafficking Victims Protection Act to the Conduct for which the Defendant was Convicted

The defendant invokes the rule of lenity to contest the applicability of the sex trafficking and forced labor statutes to the conduct about which evidence was adduced at trial. As the Supreme Court explained,

> ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. . . . [W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. This principle is founded on two policies that have long been part of our tradition. First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should. Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

United States v. Bass, 404 U.S. 336, 347-48, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971) (internal citations and quotation marks omitted). The rule of lenity is only applicable when there is a "'grievous ambiguity or uncertainty in the language and structure of the Act.'" *Chapman v. United States*, 500 U.S. 453, 463, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991) (*quoting Huddleston v. United States*, 415 U.S. 814, 831, 94 S. Ct. 1262, 39 L. Ed. 2d 782 (1974)).

The statutes at issue here were enacted as part of the Trafficking Victims Protection Act of 2000 ("TVPA"), a

sub-section of the Victims of Trafficking and Violence Protection Act of 2000. *See* Pub. L. No. 106-386, 114 Stat. 1464 (2000). In relevant part, the statutes provide as follows:

> *18 U.S.C. § 1589 ("the forced labor statute")*
>
> Whoever knowingly obtains the labor or services of another person . . . by threats of serious harm to, or physical restraint against, that person or another person [shall be guilty of a crime.]
>
> *18 U.S.C. § 1591(1) ("the sex trafficking statute")*
>
> Whoever knowingly . . . in or affecting interstate or foreign commerce . . . recruits, entices, harbors, transports, provides, or obtains by any means a person . . . knowing that force, fraud, or coercion . . . will be used to cause the person to engage in a commercial sex act [shall be guilty of a crime.]

The defendant makes two principal arguments as to why the court should find that these statutes are ambiguous such that the court should invoke the rule of lenity and set aside his convictions. First, the defendant contends that the TVPA should not apply to "intimate, domestic relationship[s]" like the one at issue here. (Def.'s Mem. 1.) Second, the defendant argues that the application of the sex trafficking and forced labor statutes to BDSM activities renders the statutory language ambiguous. (*See id.* at 17.) For the reasons stated below, the court finds both arguments to be without merit.

1. Applicability of the TVPA to Domestic, Intimate Relationships

The defendant relies primarily on the legislative history of the TVPA to make the case that the charged

statutes are inapplicable to intimate relationships. According to the defendant, the legislative history demonstrates that these statutes were intended to respond to the "problem of international slave trafficking," which is "a far cry from acts of violence and abuse that take place in the context of an intimate personal relationship." (Def.'s Mem. 14.) On this basis, he claims that his intimate relationship with Jodi renders inapplicable (a) the "labor or services" element of the forced labor statute and (b) the "commercial sex act" element of the sex trafficking statute. The court is not persuaded that the statutory language of either statute is ambiguous such that a resort to the legislative history is appropriate and, moreover, finds that the legislative history fails to support the defendant's reading of the statutory language. Finally, to the extent that there are any ambiguities in the statutory language, the court finds that they are hypothetical only and inapplicable to the instant case.

(a) Meaning of "Labor or Services" in the Forced Labor Statute

The defendant urges the court to invoke the rule of lenity to narrowly construe the phrase "labor or services" in the forced labor statute on the ground that the phrase is ambiguous in the context of an intimate relationship. According to the defendant, this phrase could be understood to encompass either all forms of work included in the dictionary definition or it could mean only those forms of work for which a person would ordinarily be compensated. The defendant argues that the court should limit the ambit of the statute to labor or services for which compensation is ordinarily given in order to exclude household chores performed as part of an intimate living arrangement. (Def.'s Mem. 17.) Ac-

cording to the defendant, such a narrow interpretation of the term "labor or services" is required to prevent a wide range of everyday conduct from falling within the reach of the statute.

As the defendant's argument implicitly acknowledges, the plain language of the statute provides no support for his contention. "'A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Harris v. Sullivan*, 968 F.2d 263, 265 (2d Cir. 1992) (*quoting Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979)). The ordinary meaning of the term "labor" is an "expenditure of physical or mental effort especially when fatiguing, difficult, or compulsory." *Webster's Third New International Dictionary Unabridged* (2002), *available at* http://www.mwu.eb.com; *see also Chapman v. United States*, 500 U.S. 453, 462, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991) (relying on dictionary definition to determine the ordinary meaning of the term "mixture"). The term "services" is defined as "useful labor that does not produce a tangible commodity." *Webster's Third*. These definitions yield scant support for the defendant's contention that the usual presence of compensation for the labor or services at issue should be a requirement for a conviction under the forced labor statute. Accordingly, the court finds no ambiguity in the statutory language.

In making his claim that the court should limit the types of labor or services that fall within the statute's reach to those for which compensation is ordinarily given, the defendant relies primarily on the TVPA's legislative history. However, in the absence of ambiguity,

"'[only] the most extraordinary showing of contrary intentions' in the legislative history will justify a departure from [the statutory] language." *United States v. Albertini*, 472 U.S. 675, 680, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985) (*quoting Garcia v. United States*, 469 U.S. 70, 75, 105 S. Ct. 479, 83 L. Ed. 2d 472 (1984)). Therefore, courts should only look to legislative history to interpret unambiguous statutes in "rare and exceptional circumstances."[8] *Garcia*, 469 U.S. at 75, 105 S. Ct. 479 (citation and internal quotation marks omitted); *see also United States v. Giordano*, 442 F.3d 30, 40-41 (2d Cir. 2006) (finding the rule of lenity and use of legislative history inappropriate when the statute unambiguously reaches the conduct at issue). The court does not find the requisite extraordinary circumstances to be present here.

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[8] The defendant relies on *United States v. Rivera*, 513 F.2d 519, 531-32 (2d Cir. 1975), for the proposition that courts may restrict the reach of a criminal statute based on its legislative history even when the statutory language is unambiguous. (*See* Def.'s Mem. 16; Def.'s Reply 4.) However, the defendant's reliance on this case is misplaced, as that portion of *Rivera's* holding was subsequently overturned by *Garcia*, 469 U.S. at 79-80, 105 S. Ct. 479. In *Rivera*, the Second Circuit reviewed a conviction pursuant to 18 U.S.C. § 2114, which prohibits assault of "any person having lawful charge, control, or custody of any mail matter of any money or other property of the United States." The Second Circuit determined—based primarily on the statute's legislative history—that the statute should be limited to postal-related offenses and not apply to any other form of robbery of government monies. *Rivera*, 513 F.2d at 532. In *Garcia*, the Supreme Court found that § 2114 unambiguously applied to offenses unrelated to the United States Postal Service, concluding that "[p]etitioners seek to clip § 2114 despite its plain terms, but the short answer is that Congress did not write the statute that way." 469 U.S. at 79-80, 105 S. Ct. 479 (citation and internal punctuation omitted).

The defendant argues that the legislative history of the TVPA shows that the statute was only meant to proscribe conduct that compels the victim to provide labor or services "for a business purpose." (Def.'s Reply 3.) However, the court finds no justification for this contention. While the legislative history of the TVPA undoubtedly focuses primarily on the need to combat international sex trafficking, the Congressional purpose and findings of the TVPA make clear the intended broad scope of the legislation. The stated purpose of the TVPA is "to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims." *See* § 102(a), 114 Stat. at 1466. Among the Congressional findings are the following:

> (3) Trafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide.
>
> (4) . . . Traffickers lure women and girls into their networks through false promises of decent working conditions at relatively good pay as nannies, maids, dancers, factory workers, restaurant workers, sales clerks, or models. Traffickers also buy children from poor families and sell them into prostitution or into various types of forced or bonded labor.
>
> . . .
>
> (6) Victims are often forced through physical violence to engage in sex acts or perform slavery-like labor. Such force includes rape and other forms of

> sexual abuse, torture, starvation, imprisonment, threats, psychological abuse, and coercion.

§ 102(b), 114 Stat. at 1466-67. While the court observes that Congress did not expressly indicate its desire to regulate labor or services performed within the household, the legislative history provides no cause to believe that Congress intended that type of labor to be excluded from the legislation's reach. In fact, the conference report on the TVPA expressly indicates the intention of Congress that § 1589 be used to regulate such conduct, emphasizing that:

> it is intended that prosecutors will be able to bring more cases in which individuals have been trafficked into domestic service, an increasingly common occurrence, not only where such victims are kept in service through overt beatings, but also where the traffickers use more subtle means designed to cause their victims to believe that serious harm will result to themselves or others if they leave, as when a nanny is led to believe that children in her care will be harmed if she leaves the home.

H.R. Conf. Rep. 106-939, 106th Cong. (Oct. 5, 2000). Moreover, while the legislative history does not address situations where traffickers have intimate relationships with their victims, the court's survey of the TVPA's legislative history reveals no expressed intention to preclude criminal liability in those contexts.[9] Accordingly,

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[9] It appears as though reading such a requirement into the statute may also decrease the effectiveness of the statute in combating trafficking. For example, according to the government, the majority of prosecutions for sex trafficking in this district involve men who have forced

the court follows the Supreme Court in *Smith v. United States*, 508 U.S. 223, 113 S. Ct. 2050, 124 L. Ed. 2d 138 (1993), and concludes that, "[h]ad Congress intended the narrow construction [the defendant] urges, it could have so indicated. It did not, and we decline to introduce that additional requirement on our own." *Id.* at 229, 113 S. Ct. 2050.

The defendant relies on *United States v. Kozminski*, 487 U.S. 931, 108 S. Ct. 2751, 101 L. Ed. 2d 788 (1988), for the proposition that the court should invoke the rule of lenity in order to avoid an unduly broad interpretation of the statute. (*See* Def.'s Reply 4-6.) *Kozminski* involved the convictions of three family members on charges that they had participated in the abduction of two mentally retarded men and then coerced them to work for up to 17 hours a day, seven days a week, initially for $15 per week, and later for no pay. 487 U.S. at 934-35, 108 S. Ct. 2751. The Supreme Court held that the term "involuntary servitude" in 18 U.S.C. § 241 and 18 U.S.C. § 1584 should be construed narrowly to exclude the use of psychological coercion to compel an individual into working. 487 U.S. at 809, 108 S. Ct. 2667. The Court found that extending the reach of those statutes beyond physical or legal coercion "would appear to criminalize a broad range of day-to-day activity," and "fail [s] to provide fair notice to ordinary people who are required to conform their conduct to the law." *Id.* Because the district court's instruction on the definition of "involuntary servitude" could have been interpreted to include the exercise of psychological coercion, the Su-

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their wives or girlfriends to engage in prostitution. (Govt.'s Resp. 27 n.13.)

preme Court reversed the convictions and ordered a new trial. *Id.* at 811, 108 S. Ct. 2667.

Kozminski does not compel the court to adopt the defendant's interpretation of the statute. In fact, the TVPA's legislative history makes clear that Congress enacted § 1589 as a response to the Supreme Court's decision in *Kozminski*. In its findings on enacting the TVPA, Congress observed:

> Involuntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion. In *United States v. Kozminski*, 487 U.S. 931, 108 S. Ct. 2751, 101 L. Ed. 2d 788 (1988), the Supreme Court found that section 1584 of title 18, United States Code, should be narrowly interpreted, absent a definition of involuntary servitude by Congress. As a result, that section was interpreted to criminalize only servitude that is brought about through use or threatened use of physical or legal coercion, and to exclude other conduct that can have the same purpose and effect.

§ 102(b)(13), 114 Stat. at 1467. The conference report on the TVPA further clarifies that: "Section 1589 will provide federal prosecutors with the tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in *Kozminski*." H.R. Conf. Rep. No. 106-939; *see also United States v. Bradley*, 390 F.3d 145, 150 (1st Cir. 2004) ("section 1589 was intended expressly to counter [*Kozminski*]"). Thus, in passing the TVPA, Congress made clear its intent that this statute be applied broadly in order to capture conduct that the Supreme Court had ruled beyond the reach of the statutes prohibiting involuntary servitude. Of course, the quoted language primarily reflects Congress'

intention that the "serious harm" provision of § 1589 be interpreted expansively. Yet, the court also finds this history to be a persuasive indication that courts should be cautious about reading into this statute additional requirements not compelled by either the statute's plain language or its legislative history.

The defendant additionally points to *Williams v. United States*, 458 U.S. 279, 102 S. Ct. 3088, 73 L. Ed. 2d 767 (1982) to support his argument that it is appropriate to narrowly construe an unambiguous statute in order to avoid bringing an overly broad range of conduct within the scope of federal law. However, *Williams* is clearly distinguishable from the instant case. *Williams* concerned the issue of whether knowingly depositing a check not supported by sufficient funds constituted a "false statement" in violation of 18 U.S.C. § 1014. The Supreme Court observed that this interpretation of the statute ran contrary to its literal meaning because "a check is not a false assertion at all, and therefore cannot be characterized as 'true' or 'false.'" *Williams*, 458 U.S. at 284, 102 S. Ct. 3088. The *Williams* court acknowledged that the government's argument to the contrary was plausible but emphasized that it "slights the wording of the statute." *Id.* (quoting *United States v. Enmons*, 410 U.S. 396, 399, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973)). Given that the government's suggested interpretation also lacked support in the statute's legislative history and would greatly expand federal criminal liability, the Supreme Court held that depositing bad checks did not constitute a violation of § 1014. *Id.* at 290, 102 S. Ct. 3088. In so holding, the Court stressed that the statute is "not unambiguous" and "both readings . . . are plausible." *Id.* In contrast, the forced labor statute is

unambiguous and the text yields no support for the defendant's interpretation.

Further, the court is unconvinced that relying on the ordinary meaning of "labor or services" would unduly broaden the statute's reach. As an example of the potential ramifications of relying on the dictionary definition, the defendant explains that such an interpretation would enable a conviction under the statute if a couple jointly operated a bed and breakfast and their relationship became abusive. (Def.'s Mem. 18.) The defendant argues that, while work performed in relation to the operation of the bed and breakfast or performance of household chores could be considered labor, the statute should not be interpreted to proscribe coerced conduct of this nature. (Def.'s Mem. 18.) The court disagrees. Contrary to the defendant's argument, interpreting the terms "labor" and "services" in light of their ordinary, everyday meaning would not extend federal criminal liability to abusive domestic relationships more generally because § 1589 requires a link between the physical restraint or threats of serious harm and the obtaining of labor or services. Using the defendant's examples, if one spouse uses the means proscribed by the statute to coerce his spouse into performing domestic chores or tasks related to the operation of the bed and breakfast, a trier of fact would be able to find a violation of the forced labor statute. The court sees no reason why the existence of a domestic partnership between two individuals should preclude criminal liability if one person knowingly uses "threats of serious harm to, or physical

restraint against, that person or another person," to obtain labor or services.[10] *See* § 1589.

Finally, the defendant's arguments on this claim are purely hypothetical, as the labor or services at issue in the instant case fall within the defendant's proposed definition of the terms. Based on the evidence presented at trial, the tasks Jodi performed at the defendant's behest are not household chores but rather labor or services that would, in fact, ordinarily have been compensated. For example, the jury asked the court to clarify whether the following acts could fall within the meaning of labor in the forced labor count: "setting up and maintaining websites, writing diaries, posing for pictures, HTML coding, clicking ads, recruiting services of other trainees, [and] commercial sex acts." (Tr. at 1428; Ct. Ex. 20.) As outlined in the court's recitation of the facts, the evidence suggests that Jodi engaged in each of these acts and that the defendant profited from displaying the fruits of her labor on the Slavespace website. The defendant has provided no reasoned explanation why these acts should be excluded from the reach of the phrase "labor or services" in § 1589, and the court finds none.

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[10] The defendant also quotes the government's somewhat ambiguous statement at trial that "a factual situation that looks like rape" might fall within the reach of the forced labor statute. (*See* Tr. at 1439-40.) The defendant argues that this statute was never intended to be used to prosecute rape and should not be interpreted in a manner that would enable the government to do so. The court recognizes that, in certain circumstances, a sexual act may constitute a labor or service. However, the court fails to see how the forced sexual act endured by a rape victim falls within the ordinary meaning of the phrase "labor or services," as defined by the court in this opinion. Accordingly, the court sees no danger that this statute will be unduly broadened to accommodate prosecutions for rape.

(b) Meaning of "Commercial Sex Act" in the Sex Trafficking Statute

The defendant additionally contends that the meaning of the term "commercial sex act" in 18 U.S.C. § 1591 is ambiguous because it "may be deemed to include all sexual behavior provided that the defendant somehow profits from it; or, it may be limited to sexual conduct which falls outside the scope of the intimate relationship between the defendant and the complainant." (Def.'s Mem. 17.) The court finds this argument nonsensical, as the statute's plain language refutes the former interpretation. Section 1591 proscribes trafficking a person knowing that "force, fraud, or coercion . . . will be used to cause the person to engage in a commercial sex act." 18 U.S.C. § 1591(a). The statute defines a commercial sex act as "any sex act, on account of which anything of value is given to or received by any person." *Id.* § 1591(c)(1). So, while a commercial sex act is quite broadly defined in the statute, the requirement that it be a product of force, fraud or coercion precludes the potential broad sweep about which the defendant expresses concern. As will be discussed below, *see infra* Section I(D)(1), the government has presented sufficient evidence to show that the commercial sex acts at issue here were not a product of an intimate relationship but, rather, were obtained through force, fraud or coercion.

For these reasons, the court rejects the defendant's contention that his conviction should be overturned because the TVPA was never meant to regulate conduct that occurs within a domestic, intimate relationship. The court finds that, as long as the evidence is sufficient to establish that the required elements of each statute are present, the mere existence of a past or present do-

mestic, intimate relationship should not preclude conviction

2. Applicability of the TVPA to BDSM Conduct

The defendant argues that various aspects of the statutes at issue become ambiguous when applied to a BDSM relationship. The court finds that any ambiguities in the statutes were already resolved in the defendant's favor at trial and, therefore, a judgment of acquittal on these grounds is unwarranted.

(a) Meaning of "Physical Restraint" and "Serious Harm" in the Forced Labor Statute

The defendant contends that the terms "physical restraint" and "serious harm" in the forced labor statute become ambiguous when applied to BDSM conduct because threats of serious harm and physical restraint may be part of a consensual BDSM relationship. (Def.'s Mem. 17.) However, the defendant raised these concerns in his objections to the government's proposed jury instructions, and the court construed the statute narrowly in order to explicitly exclude consensual BDSM conduct. Accordingly, the court instructed the jury:

> Throughout the trial, you have heard evidence about sexual practices called Bondage, Discipline/Domination, Submission/Sadism, Masochism, or "BDSM," that may involve actual physical restraint, such as being tied up or placed in a cage. The mere fact that a person was physically restrained during the course of such acts does not necessarily mean that the statute was violated. For example, if the physical restraint was consensual, then it would not constitute a violation of the statute. It is for you to decide,

> based on a careful consideration of all the facts and surrounding circumstances, whether the acts of physical restraint violated the statute.

(Jury Charge, Dkt. No. 202 [hereinafter "Jury Chg."] 21, 17.) With regard to "threats of serious harm," the court referred the jury to the definition given in the court's instruction on sex trafficking, where the court instructed the jury that "the threats must be improper and must involve consequences that are sufficient, under all the surrounding circumstances, to compel or coerce the victim into engaging in a commercial sex act that the victim would not otherwise have willingly engaged in." (*Id.* at 21, 16.) Thus, the court has already adopted the construction of the statute currently urged by the defendant in his motion for a judgment of acquittal. As will be discussed below, *see infra* Section I(D)(2), the evidence is sufficient to support the defendant's forced labor conviction when the statute is construed in a manner that excludes consensual BDSM conduct from its reach.

(b) Meaning of "Force" and "Coercion" in the Sex Trafficking Statute

With respect to the sex trafficking statute, the defendant similarly contends that the terms "force" and "coercion," when given their ordinary meaning, may encompass consensual BDSM conduct. (Def.'s Mem. 17.) Again, the court agrees with the defendant that it is appropriate to construe these terms narrowly to avoid criminalizing consensual conduct. In the court's instructions to the jury, the court defined the term "coercion" as "threats of serious harm to or physical restraint against any person, or any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physi-

cal restraint against any person." (Jury Chg. 16.) The court defined the terms "physical restraint" and "threats of serious harm" in the same manner described in the previous section, which explicitly excluded consensual conduct. (*See id.*)

The court observes that the term "force" was defined more broadly in the jury instructions, as "any form of violence, compulsion or constraint exercised upon another person in any degree." (*Id.*) However, this definition was followed in the same section by the court's explicit instruction that physical restraint as part of consensual BDSM conduct would not constitute grounds for a conviction under the statute (*see id.* at 17), a caveat that should have cured any ambiguity about the statute's scope vis-á-vis consensual conduct.[11] In any event, for the purposes of the defendant's sufficiency challenge, *see infra* Section I(D)(1), the court will only consider applications of force that the government presented sufficient evidence to show were non-consensual.

(c) Meaning of "Includes" in the Aggravating Element of the Forced Labor Statute

In addition, the defendant contends that the relationship of the aggravating element of aggravated sexual abuse to the violation of the forced labor statute is ambiguous. (Def.'s Mem. 17.) The forced labor statute provides a statutory aggravating element when "the violation [of the statute] includes . . . aggravated sexual abuse." 18 U.S.C. § 1589. According to the defendant,

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[11] The court also notes that, in the course of defining the elements of aggravated sexual abuse, a statutory aggravating factor of the forced labor statute, the court instructed the jury that "the application of force with the consent of the recipient in the context of BDSM activities would not violate the statute." (Jury Chg. 24.)

it is unclear whether any non-consensual sexual conduct in the course of BDSM activities is sufficient to satisfy this element or whether such conduct must be undertaken in order to obtain the labor or services at issue. While the court recognizes that, in other cases, a broader interpretation of the aggravating element may be appropriate, the court construed this element quite narrowly in its jury charge. The court instructed the jury that "the government must prove that the defendant obtained the labor and services of Jodi through the use of, in whole or in part, . . . aggravated sexual abuse." (Jury Chg. 25.) The court finds that this definition makes clear the requisite nexus between the aggravated sexual abuse and the violation of the statute. The defendant does not argue that there was insufficient evidence to enable the jury to find that the conduct at issue fit within the court's more narrow construction of the statutory aggravating factor, so there is no need to address that issue here.

C. Photographs of Sex Acts as "Commercial Sex Acts" under the Sex Trafficking Statute

Next, the defendant claims that the government failed to establish that Jodi engaged in a "commercial sex act" within the meaning of the sex trafficking statute because the commercial gain resulted from the depiction of sex acts rather than from the acts themselves. Essentially, the defendant's interpretation of the term "commercial sex act" would limit the purview of the statute to prostitution and exclude pornography. The court finds no support for this contention. As explained above, *see supra* Section I(B)(1)(b), the statute broadly defines a commercial sex act as "any sex act, on account of which anything of value is given to or received by any person."

18 U.S.C. § 1591(c)(1). The statutory language provides no basis for limiting the sex acts at issue to those in which payment was made for the acts themselves; rather, the use of the phrase "on account of which" suggests that there merely needs to be a causal relationship between the sex act and an exchange of an item of value. If Congress had intended to limit the commercial sex acts reached by the statute to prostitution, it could have easily drafted the statute accordingly.

The court's more expansive understanding of the term is supported by the statute's purpose, which was to protect individuals from being victimized by trafficking. In particular, the Congressional findings in the TVPA include the recognition that "[t]he sex industry has rapidly expanded over the past several decades. It involves sexual exploitation of persons, predominantly women and girls, involving activities related to prostitution, pornography, sex tourism, and other commercial sexual services." § 102(b)(2), 114 Stat. at 1466. The findings also noted the lack of a "comprehensive law . . . that penalizes the range of offenses involved in the trafficking scheme." § 102(b)(14), 114 Stat. at 1467. As the government points out, construing the commercial sex acts included within the ambit of the statute broadly focuses the trier of fact's inquiry on whether a given individual has been sexually exploited for profit, rather than on whether traffickers profited directly or indirectly from the exploitation, and is therefore more consistent with the statute's purpose. (*See* Govt.'s Resp. 17.)

In the absence of any ambiguity in either the statutory language or the legislative history, the court finds that a narrow construction of the statute restricting its reach to prostitution is unwarranted. Accordingly, the

court concludes that, for purposes of criminal liability under the sex trafficking statute, a commercial sex act may include sexual acts that are photographed for commercial gain. The defendant has not contested that he derived financial benefit from photographs of Jodi engaging in sex acts as defined in the jury charge[12]—indeed, the Slavespace website is replete with them (*see, e.g.*, Govt. Ex. 2C, at 522, 525-28, 1223, 1830-35, 1846-49, 1852-69, 2557-2565, 3956)—and, therefore, no further review of the sufficiency of the evidence in this regard is required.

D. Sufficiency of the Evidence with Regard to the Nexus between the Defendant's Abuse of the Victim and a Commercial Sex Act or Labor and Services

The defendant makes two additional arguments as to why the evidence is insufficient to support his conviction: (1) the government failed to establish a sufficient nexus between the defendant's conduct and the commercial sex acts at issue; and (2) the evidence does not show a link between the defendant's abuse of Jodi and the labor and services provided by Jodi. According to the

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[12] The jury charge defined sex act as:

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(Jury Chg. 17-18.)

defendant, the evidence establishes, at best, only that the defendant forced Jodi to continue a sexual relationship with him against her will but not that his abuse was intended to cause her to engage in a commercial sex act or to provide labor or services. (Def.'s Mem. 21-22). The defendant analogizes the instant case to one in which a husband sexually assaults his wife and explains, "[j]ust as the husband's act of sexual assault is not designed to compel his wife to perform the domestic services that are incidental to most marriages, such as the cooking, shopping and cleaning, the defendant's acts of violence were not designed to compel the complainant's services on his website." (*Id.* at 22.) For the reasons stated below, the court dismisses these claims.

1. Nexus between the Defendant's Conduct and a "Commercial Sex Act" under the Sex Trafficking Statute

As the court instructed the jury, the government was required to prove three elements beyond a reasonable doubt in order for the jury to find the defendant guilty of sex trafficking in violation of 18 U.S.C. § 1591. The government had to prove that: (1) the defendant engaged in a prohibited trafficking activity; (2) the defendant's trafficking activity affected interstate commerce; and (3) the defendant knowingly used force, fraud or coercion to cause the trafficked individual to engage in a commercial sex act. (Jury Chg. 13-14.) The defendant submits that the government failed to establish the third element of this offense, because the evidence is insufficient to show a relationship between the force, fraud, or coercion employed by the defendant and the commercial sex acts at issue. The court finds the defendant's argument in this regard unpersuasive.

There are at least two instances in which a reasonable jury could have found, based on the evidence presented at trial, that the defendant's non-consensual application of force directly caused Jodi to engage in a commercial sex act. First, in October 1999, after Jodi communicated to the defendant that she wanted to leave him, he beat her severely and then, while Jodi was handcuffed to a board with a whiffle ball in her mouth and needles through her lips, he ordered Joanna to insert a butt plug in Jodi's anus. (*See* Tr. at 105-07; Govt. Ex. 2C, at 368-70.) Because the photograph of Jodi bound and gagged with the butt plug inserted was posted on the Slavespace website (*see* Govt. Ex. 2C, at 374, 1223) and the defendant received revenue from this site (*see* Tr. at 149-50, 153; Govt. Ex. 23), a jury could find that this act constitutes a commercial sex act as defined in the previous section. Jodi's testimony that she had just told the defendant she wanted to leave, that she was screaming and crying throughout the incident, and that she was physically restrained is more than sufficient to allow a reasonable jury to draw the inference that the defendant used force to cause her, in whole or in part, to engage in this act.

Second, in January 2001, while Jodi's hands were tied with rope, the defendant pierced Jodi's labia with a safety pin and attached a padlock to it (*see* Tr. at 150-51), and a series of photographs depicting this incident were placed on the website (*see* Govt. Ex. 2C, at 546-51, 1846-59.) A reasonable jury would have been able to draw the conclusion that this constitutes a commercial sex act as previously defined. The jury would also be able to reasonably infer that the defendant's use of force caused Jodi to engage in this act, based on Jodi's testimony that this incident took place during the time

period that she was with the defendant non-consensually, that she was bound, that a wash cloth was put in her mouth to silence her screaming, and that the defendant whipped her with a knife to keep her from crying. In addition, the photographs of Jodi's face during the incident, in which she appeared to be screaming and experiencing pain (*see id.* at 1840-43), further support the reasonableness of such an inference.

More generally, the evidence presented at trial was also sufficient to support the inference that the defendant's use of force, fraud and coercion to prevent Jodi from leaving were not only aimed at preserving their sexual relationship but also intended to maintain her services as a model for his commercial website. Evidence was presented at trial that, on two separate occasions-in October 1999 and March 2001—Jodi told the defendant she wanted to leave the relationship and he severely punished her. (*See* Tr. at 104-09; 159-68.) Jodi testified that, after both of these experiences, she was unable to leave the defendant because she was terrorized with fear. (*See* Tr. at 108, 168, 170.) On the basis of this evidence, a jury could find that the defendant's use of force on these occasions served as a threat of serious harm to Jodi should she try to leave in the future and, thereby, constituted coercion.

The jury could have also reasonably concluded that the defendant used non-physical threats to coerce Jodi into maintaining her relationship with the defendant. In particular, Jodi testified that, when she expressed her unhappiness in the relationship and broached the subject of leaving, the defendant threatened to send sexually explicit pictures to her family and the media. (*See* Tr. at 158-59.) Given Jodi's testimony that Jodi was on

the telephone when the defendant threatened to kill Joanna's godson and send pictures to Joanna's family, the defendant's threats to Joanna could also be interpreted as intended to coerce Jodi into staying.

The evidence further suggests that Jodi's services as a model on the defendant's website were an important part of their relationship. Jodi's testimony and the binder of excerpts from the Slavespace website indicate that significant numbers of the encounters between Jodi and the defendant were photographed and placed on the site. The government presented evidence that, aside from the Slavespace website, the defendant's only other sources of income during the relevant time period were the women serving him, sales of a small number of comic books, and revenue from another website he owned that was eventually shut down. (*See* Tr. at 212, 437-38.) Thus, the jury could infer that it was important to the defendant to maintain the several hundred dollars a month earned in membership and advertising revenues from Slavespace. This impression is reinforced by the defendant's statement to Jodi in November 1999 to the effect that he did not want to hear anything from "it" "except how my site is doing." (Govt. Ex. 30, at 1.) Further, Jodi testified that the defendant demonstrated an active interest in the site and its earnings, monitoring the site daily and checking on the membership and advertisement revenues earned and the website's popularity ratings. (*See* Tr. at 401.) Based on this evidence, it would be reasonable to infer that the defendant sought to perpetuate his relationship with Jodi—at least in part—to photograph her BDSM activities, including those that constitute sex acts, in order to place them on his website and earn revenue from them.

The defendant argues that the existence of a prior consensual relationship between the defendant and Jodi in which the infliction of punishment and pain was part of their mutual sexual gratification makes it impossible to determine whether the defendant abused Jodi to compel the performance of a commercial sex act. He argues that the violence inflicted could also have been for purely sexual pleasure or as a means to reinforce their previously agreed-upon roles in the relationship. (Def.'s Reply 6.) The court acknowledges that the issue of whether the government proved beyond a reasonable doubt that the defendant used non-consensual force, fraud or coercion to cause Jodi to engage in a commercial sex act is difficult and complicated. However, this was precisely the question that the jury was charged with resolving (*see* Jury Chg. 16), and the evidence was adequate to support its conclusion. The existence of other potential motivations for the defendant's behavior does not alter the court's determination in this regard.

2. Nexus between the Defendant's Conduct and "Labor or Services" under the Forced Labor Statute

A conviction of forced labor under 18 U.S.C. § 1589 required the government to prove beyond a reasonable doubt that (1) the defendant obtained the labor or services of another person; (2) the defendant did so by using either (a) threats of serious harm to, or physical restraint against, that person or any other person; or (b) a scheme, plan or pattern intended to cause the person to believe that non-performance would result in serious harm to, or physical restraint against, that person or any other person; and (3) the defendant acted knowingly. (Jury Chg. 19-20.) The court instructed the jury that the government was not required to link specific threats

or actions taken against Jodi to particular labor tasks she performed. (*See* Jury Chg. 22.) Instead, the government needed to establish that there was a connection between the threats made or physical restraint by the defendant and the labor and services she rendered. (*Id.*) Thus, the government could satisfy the second element by showing a connection between punishments imposed by the defendant and the labor or services at issue or a climate of fear that was sufficient to cause her to perform labor or services against her will. (*Id.*) The defendant argues that the government's evidence was insufficient because the punishments imposed by the defendant were part of his intimate relationship with Jodi and were unconnected with obtaining her labor or services on the website. This argument is meritless.

Based on Jodi's testimony, the jury could have reasonably found the requisite connection between punishments imposed by the defendant and her provision of labor and services on the website. Jodi explained that the defendant punished her when she did not upload diary entries or photographs to the website as quickly as the defendant wanted or when the website was not making enough money to please the defendant. (Tr. at 149). When asked to identify the most severe punishment she recalled related to her work on the website, she recounted the April 2001 incident in which the defendant pierced her labia with a safety pin. (*Id.* at 150-51.) Even though Jodi did not detail precisely what she had done to incur this punishment, the jury could still reasonably believe that this incident was connected to her tasks on the Slavespace website. The ability of a fact finder to reasonably presume that the defendant's punishments compelled Jodi's work on the website is buttressed by her testimony that she only worked on the website be-

cause she knew she would be severely punished if she refused. (*See id.* at 149.) Thus, a reasonable jury could find that the defendant obtained Jodi's labor on his website through a persistent pattern of punishing her when he was dissatisfied with her work.

The defendant claims that the evidence is insufficient to support a connection between the punishments and Jodi's labor on the website based on Jodi's testimony that she was "always being punished" for being disobedient and could be punished "for no reason at all." (*Id.* at 207.) According to the defendant, the only reasonable inference that could be drawn is that the defendant's punishments were sexual in nature and intended only to reinforce his status in their BDSM relationship. (Def.'s Mem. 23.) However, that the defendant would, at times, randomly punish Jodi does not prevent a fact finder from crediting Jodi's testimony that there was, on other occasions, a direct connection between the punishments he inflicted and Jodi's performance with regard to the website. Moreover, the occasional randomness of the violence could reasonably be interpreted as an attempt to enhance Jodi's fear of being punished and her desire to minimize instances where she provoked the defendant's anger.

The evidence also suffices to establish that the defendant's actions to maintain Jodi in a relationship with him were aimed at compelling her to provide labor and services. As described above, *see supra* I(D)(1), it would be reasonable to believe that the defendant knowingly used force and coercion to maintain a non-consensual relationship with Jodi from October 1999 to August 2001. Based on the evidence presented by the government, the defendant also employed force and coercion in an at-

tempt to maintain his relationship with Joanna, who maintained the Subspace website. When his efforts were unsuccessful, the defendant became reliant on Jodi to create and maintain the Slavespace website, and she devoted a significant amount of time daily to this task. Based on the economic importance of the website to the defendant, as previously described, *see supra* I(D)(1), a reasonable jury could conclude that the defendant kept Jodi in a relationship against her will in order to obtain her labor on his site.

Accordingly, the defendant's Rule 29 motion is denied. While this case undoubtedly presents a novel application of the forced labor and sex trafficking statutes, the evidence at trial was sufficient to show that defendant's conduct fell within the plain language of the statutes. To the extent that the BDSM conduct at issue created any ambiguities in interpreting the evidence, the court construed the statute in the defendant's favor. The defendant has failed to persuade the court that the TVPA's legislative history or any other factor merits setting aside the defendant's conviction.

II. Rule 33 Motion

In the alternative, the defendant argues that the court should order a new trial so that the jury can be instructed that it must find that the defendant's "dominant purpose" in employing force or coercion was to obtain a commercial sex act or labor or services in order to convict under the sex trafficking statute and the forced labor statute, respectively. The defendant continues to express the concern that he was convicted for sexual conduct within an intimate relationship and emphasizes that the BDSM conduct at issue likely complicated the jury's interpretation of the legal elements of the stat-

utes. (*See* Def.'s Mem. 24.) For the reasons stated below, the defendant's motion is denied. The court determines that the defendant has failed to provide a sufficient basis for importing such a "dominant purpose" requirement into the statutes. Further, given the evidence presented at trial, the court is persuaded that a commercial purpose sufficiently animated the defendant's conduct towards Jodi that the existence of any additional motives for the behavior leading to his conviction does not satisfy the requirements of Rule 33.

A. Standard of Review

Rule 33 provides that a court may vacate a judgment and grant a new trial "if justice so requires." The discretion granted under the rule is broad, but far from unfettered, and the relief available under the rule is to be granted "with great caution and in the most extraordinary circumstances." *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992). "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice." *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001). "There must be a real concern that an innocent person may have been convicted." *Sanchez*, 969 F.2d at 1414. In exercising its discretion under Rule 33, "the court is entitled to weigh the evidence and in so doing evaluate for itself the credibility of the witnesses." *Id.* at 1413 (citation and internal quotation marks omitted.)

B. Defendant's Claim that a Conviction Requires the Jury to Find that the "Dominant Purpose" of the Force or Coercion was to Obtain the Commercial Sex Act or Labor or Services

With respect to the sex trafficking statute, the court instructed the jury that a conviction required the government to prove that "the trafficking activity was undertaken for the purpose of causing a person to engage in a commercial sex act." (Jury Chg. 17.) Similarly, the court instructed the jury that a conviction under the forced labor statute required the government to prove that the defendant used threats or employed prohibited actions "for the purpose of obtaining labor or services." (*Id.* at 23.) While the defendant did not contest these instructions at trial, [13] he now argues that a new trial is warranted so that the jury may be tasked with determining whether obtaining the commercial sex act or labor or services was a "dominant purpose" of the defendant's use of coercion or threats. (Def.'s Reply 7-9.)

The defendant relies on *United States v. Sirois*, 87 F.3d 34 (2d Cir. 1996), and *United States v. Miller*, 148 F.3d 207 (2d Cir. 1998), for the proposition that the court should have instructed the jury that a conviction required it to find that one of the dominant purposes of the defendant's actions was to force Jodi to engage in the conduct at issue. In *Sirois*, the Second Circuit reviewed the district court's jury charge with respect to 18 U.S.C. § 2251(a). Section 2251(a) proscribes a variety of conduct done with "the intent that [any] minor engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct" in inter-

[13] In fact, the defendant suggested the language quoted with respect to the forced labor statute. (*See* Tr. of 2/7/07 Tel. Conf., at 36-37.)

state or foreign commerce. In *Sirois*, the district court had instructed the jury that, in order to convict the defendant, "it is not necessary for the government to prove . . . that illegal sexual activity, or visual depiction of that activity, was the sole or even the dominant purpose of the minors being transported. It is enough if the evidence shows that the illegal sexual activity was one of the dominant purposes of the trip." 87 F.3d at 39. On appeal, Sirois argued that the jury should have been instructed that the statute required a finding that the production of visual depictions of illegal sexual activity constituted the sole dominant purpose of the transportation. *Id.* The Second Circuit rejected this argument, finding that the jury could convict under the statute so long as the evidence showed that such an end "was one of the dominant motives for the interstate transportation of the minors, and not merely an incident of the transportation." *Id.* In *Miller*, the Second Circuit reaffirmed convictions under 18 U.S.C. § 2422 and 18 U.S.C. § 2423(a), which prohibit, respectively, coercing travel and transporting minors, when such activities are undertaken with the intent that the victim engage in prostitution or other criminal sexual activity. *See* 148 F.3d at 207. The *Miller* court upheld the district court's charge to the jury, which tracked the above-referenced charge in *Sirois*, and rejected a similar challenge that the proscribed activity had to be the sole dominant purpose of the defendant's conduct. *See Id.* at 211-12.

Those cases are insufficient to persuade the court that the requisite extraordinary circumstances are present mandating a new trial. Not only do *Sirois* and *Miller* interpret statutes different from those at issue here, but the Second Circuit never addressed the issue presently before the court, namely whether the district court

was required to instruct the jury that the prohibited activity had to be a dominant purpose of the defendant's conduct. Further, the language of the sex trafficking and forced labor statutes do not suggest such a requirement, nor is the defendant able to point to any language in the legislative history suggesting that the reach of the statutes should be limited in this manner.

Finally, the court is not convinced that a manifest injustice would result in the absence of a new trial. The defendant makes a valiant attempt to depict his conduct as, at worst, domestic violence and to paint any commercial aspects as merely incidental to what was really an intimate relationship. However, such a characterization vastly understates the role that the defendant's website appeared to play in his relationship with Jodi. Jodi testified about a wide variety of intimate conduct between her, the defendant, and other women that was photographed and displayed, for a fee, on the defendant's website. Moreover, based on her testimony, she was forced to describe this conduct—in minute detail—for posting on the website, and she was also made to spend eight or more hours a day updating the website and clicking on banner advertisements. Meanwhile, according to Jodi, the defendant monitored her work daily, punished her when her performance was not up to par and collected all of the proceeds of her labor on the website. The defendant has provided no reason why the court should question the jury's apparent determination that Jodi was a credible witness, and the court finds none. After a close review of the evidence presented at trial, the court finds the commercial aspects to be sufficiently pervasive in the non-consensual portion of the relationship between Jodi and the defendant that a new

trial on these grounds is not warranted. Accordingly, the defendant's Rule 33 motion is denied.

CONCLUSION

For the reasons given above, the defendant's motions for a judgment of acquittal pursuant to Fed. R. Crim. P. 29 and for a new trial under Fed. R. Crim. P. 33 are denied.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 07-4005-cr

UNITED STATES OF AMERICA, APPELLEE

v.

GLENN MARCUS, DEFENDANT-APPELLANT

[Filed: Dec. 8, 2008]

[Dated: Dec. 10, 2008]

ORDER

Appellee filed a petition for rehearing *in banc* from the opinion filed on August 14, 2008. A poll on whether to rehear this case *in banc* was conducted among the active judges of the Court upon the request of an active judge of the court. Because a majority of the Court's active judges did not vote in favor of rehearing *in banc*, rehearing *in banc* is hereby DENIED.

FOR THE COURT:
CATHERINE O'HAGEN WOLFE, CLERK

By: /s/ FRANKLIN PERRY

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
JUL 1 - 2009
OFFICE OF THE CLERK

No. 08-1341

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

– v. –

GLENN MARCUS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court of appeals abuse its discretion by reviewing as "plain error," under Rule 52(b) of the Federal Rules of Criminal Procedure, a defendant's claim, raised for the first time on appeal, that his conviction violated the Ex Post Facto Clause because the relevant criminal statutes were not enacted until nearly two years *after* most acts charged in the indictment occurred -- *and*, the government concedes the defendant could have been convicted exclusively on conduct that took place before the statutes' enactment?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Ex Post Facto Clause contained within Article I, § 9, Clause 3 of the United States Constitution provides, in pertinent part, that no "ex post facto Law shall be passed."

Rule 52(b) of the Federal Rules of Criminal Procedure, provides that a "plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

INTRODUCTION

This Court should not invoke the highly controversial "GVR Order" where the court of appeals, adhering to this Court's plain error standard, reversed a defendant's conviction that violated the Ex Post Facto Clause, even though the issue was raised for the first time on appeal. The Second Circuit reasoned that a retrial was warranted because, as conceded by the government, the defendant could have been convicted of acts of sex trafficking and forced labor that occurred before those statutes were ever enacted.

The Solicitor General now urges that the Second Circuit's approach to plain error review, which considers the *possibility* that the jurors relied exclusively on pre-enactment conduct when considering a remand, varies from this Court's standards. The Solicitor General argues that, instead, a conviction can only be vacated where it is "*reasonably probable*" that the jurors relied solely on conduct occurring before the statute's enactment.

The Solicitor General further suggests that the Second Circuit's position is at odds with the views of other circuits. But, curiously, rather than seek plenary review to resolve this alleged conflict, the Solicitor General asks that the Second Circuit's judgment be vacated, without considering its merits, and remanded for reconsideration in light of the Court's decision in *Puckett v. United States*, 129 S. Ct. 1423 (2009).

However, as explained below, *Puckett* merely amplifies the law relating to plain error review and is *not* an intervening decision. It also does not justify the radical action of overturning the court of appeals' cogent determination. In truth, the Second Circuit appropriately applied the long-standing standard for plain error review, carefully forged by this Court 16 years ago in *United States v. Olano*, 507 U.S. 725 (1993), and the unbroken line of cases that have followed in this Court's well-marked path leading up to the heights of plain error.

Moreover, the Second Circuit's decision is aligned with holdings of other circuits. For example, the Seventh Circuit recently decided that plain error review should presume prejudice where there is "*any possibility*" of a different outcome in the absence of the error.[1]

Finally, this Court has always entrusted plain error review to the sound discretion of each circuit court. Thus, even if slight differences exist among the circuits in the review of such claims, further examination by this Court is not needed because uniformity is not required for a procedural rule. As a consequence, the petition for certiorari, to vacate the judgment and remand for reconsideration, should be denied.

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[1] *See, e.g., United States v. Pitre*, 504 F.3d 657, 662 (7th Cir. 2007) (emphasis supplied).

STATEMENT OF THE CASE

The key events that frame the issues presented by the government's petition go back in time to 1998 when the Respondent, Glenn Marcus, who had no criminal history, became involved in a prolonged intimate relationship with a 29-year-old college graduate, referred to as "Jodi."[2]

Jodi was experienced in the bondage culture, having previously participated in a sadomasochistic relationship where, among other things, she submitted to whipping with a coat hanger; vaginal penetration with a wine bottle; having hot wax dripped on her breasts; and wearing clamps on her nipples. Jodi was photographed during these acts of sadomasochism, which were all consensual (Tr.69-72, 221, 225-28, 230, 276).[3]

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[2] The district court directed that the government's witness be referenced solely by her first name (Pet. App. 21a).

[3] That sadomasochistic relationship only ended because her partner moved out of state (Tr.230).

Pre-Enactment Conduct (October 1998 through October 2000)

In the fall of 1998, Jodi found a chatroom on the Internet for people who were similarly attracted to the alternative sexual lifestyle known as bondage, dominance/discipline, submission/sadism, and masochism ("BDSM") (Tr.72-73, 228). She met Glenn Marcus online and told him about her experiences. Sometime thereafter, Jodi initiated a relationship with him. Marcus was careful to fully explain his brand of BDSM, which did not involve "safewords" or physical limits (Tr.74-76, 247).[4] After learning about his version of bondage, Jodi wanted to meet him (Tr.74).

In the large arc of this narrative, a pivotal point occurred in October of 1998 when Jodi flew from the Midwest to Maryland to engage in a sexual relationship with Glenn Marcus, which included bondage and sadomasochism (Tr.76-79, 248). They spent three to four days together at the home of another woman, who also enjoyed this special brand of sexual activity (Tr.76).

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[4] A "safeword" is used by the submissive party in a bondage relationship to stop the action (Tr.71).

During this excursion, everyone participated in a variety of sadomasochistic activities.[5] Jodi consented to being photographed during her visit and agreed to have her pictures posted on a BDSM website (Tr.252-53). So strongly attracted to the intimate relationship was Jodi that a month later she asked if she could come back to spend more time with Marcus (Tr.77, 260).

During this second visit, they engaged in similarly intense acts (Tr.78).[6] Jodi readily agreed that it would appear to someone, who did not know about the role-playing in a BDSM relationship, that she did not want to be there even though, in reality, she did (Tr.262). Despite the extreme nature of their relationship, Jodi very much enjoyed being with Glenn Marcus (Tr.264).

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[5] For example, Jodi agreed to be blindfolded and kept naked in a cage (Tr.253). She also submitted to being whipped, and let Marcus mark the word "slave" on her stomach with a knife (Tr.76, 78, 254). Their lovemaking included an erotic act called "breath play," where Jodi's oxygen supply was intermittently cut off to heighten her sexual pleasure (Tr.254).

[6] For instance, Jodi was submerged in a bathtub, in handcuffs, with a turkey baster shoved into her mouth as a crude snorkel so that her airflow and breath could be controlled (Tr.263-64).

After this visit in November, Jodi returned to her job and family in the Midwest. However, because of the pleasure she derived from the sexual acts, Jodi wanted to be with Marcus. Therefore, in January of 1999, Jodi packed up her belongings and drove to Maryland where she shared an apartment with the other woman (Tr.266, 270). They regularly drove to New York to bring Glenn Marcus to Maryland for three or four days of "sadomasochistic encounters" (Tr.87). *The government concedes that the relationship was purely voluntary -- and that Jodi acted willingly -- throughout the period from October 1998*, when she first traveled to Maryland, *through October 1999* (Tr.170).

At trial, Jodi claimed that she decided to leave Marcus in October 1999 after an extreme session of BDSM (Tr.106-07, 300). However, Jodi did not end their relationship at that time. Instead, at Christmas, she flew back to the Midwest to celebrate the holidays with her family -- as she did every year (Tr.135, 312-13).

And, rather than confide in her family or the authorities, at the end of the visit *Jodi flew back to Maryland to continue the sadomasochistic relationship* (Tr.313). During this time, Jodi routinely wrote diary entries which were posted on their BDSM website, together with photographs of their activities (Tr.91-92).

The other woman eventually removed Jodi from the apartment because she believed Jodi broke into her bedroom and took her property (Tr.132). As a consequence, in January of 2000, Jodi moved to New York City to live with a childhood friend of Marcus (Tr.327-29). While in New York, Jodi worked, from home, on a BDSM website called "Slavespace.com" (Tr.143, 148-49, 323).[7] In addition, she continued her long-term BDSM relationship with Glenn Marcus, seeing him approximately once a week (Tr.153). All of this conduct occurred *before* the enactment of the Sex Trafficking and Forced Labor statutes.

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[7] The website only earned "several hundred" dollars each month from its advertisers and member section (Tr.152).

Post-Enactment Conduct
(November 2000 through October 2001)

On October 28, 2000, the Trafficking Victims Protection Act of 2000, which includes the offenses of Sex Trafficking and Forced Labor, became effective. Shortly thereafter, in November of 2000, *Jodi began working outside of the apartment* in a corporate office, earning more than $40,000 a year (Tr.331-32). Despite commuting from Queens to Manhattan each day for her *fulltime job*, at trial Jodi claimed that she also worked *8 to 10 additional hours each day* on the BDSM website (Tr.332-33).

Jodi testified that in March of 2001, she again wanted to sever her relationship with Glenn Marcus (Tr.159). Marcus supposedly said he would let her leave, if she allowed him to "punish" her one last time (Tr.160). Days later, she met him at a friend's house where they engaged in extreme BDSM activity (Tr.161-66).

In August of 2001, Marcus' childhood friend asked Jodi, who was living with her rent-free, to move out (Tr.172). Therefore, in September of 2001, Jodi moved into her own apartment, and created her own BDSM website (Tr.172, 338, 342). This ended the "non-consensual" period of Jodi's relationship with Glenn Marcus, as charged in the indictment.

Jodi continued to see Marcus for several more years, and they engaged in *consensual* sadomasochistic activities (Tr.173, 176, 340). She also *voluntarily* posed in sexually explicit photographs for the Slavespace website until some point in 2003 (Tr.350, 351, 364, 410).

Jodi concedes that she never told anybody, other than Marcus, that she was unhappy during the relationship (Tr.208).[8] This included her roommate, as well as her family and co-workers (Tr.334). Jodi appeared to be "smart, strong, independent [and] athletic" (Tr.630). And, to outsiders, including Marcus' adult daughter, they seemed like a "normal couple" (Tr.628).[9]

In 2004, three years after Jodi got her own apartment, she went to a lawyer because Marcus refused to remove photographs of her from the Slavespace website (Tr.352). As a consequence, in May of 2005, Marcus was arrested on a complaint and released on a bond secured by his parents' home (A.3). Then, nearly two years later, on February 9, 2007, a superseding indictment was returned (A.26).

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[8] Jodi knew that Marcus never retaliated against any women who decided to end their BDSM relationship with him (Tr.311-12).

[9] She continued to go on camping trips with Glenn Marcus, together with his daughter, and son-in-law, who is a former prosecutor (Tr.340, 363; PSR ¶ 59). In addition, she invited Marcus' daughter to her home for a "family" dinner (Tr.634-35).

Count One alleged "Sex Trafficking" in that, between January 1999 and October 2001, Glenn Marcus knowingly and intentionally caused Jodi to "engage in a commercial sex act" -- referring to the photographs posted on their website -- through force, fraud and coercion, in violation of 18 U.S.C. § 1591 (A.26-27). Marcus was also charged with "Forced Labor" in that, between the same time period, he allegedly obtained Jodi's services by threat of serious harm and physical restraint, in violation of 18 U.S.C. § 1589. This count related to her work on the website (A.27).

After *deliberating for seven days*, the jury found Glenn Marcus guilty of both counts (A.378).[10] The district court then imposed a non-guideline sentence of *nine years imprisonment* (A.379-80).

On appeal, Marcus argued, for the first time, that the convictions violated the Ex Post Facto Clause. The Second Circuit reviewed the matter for plain error under Rule 52(b), vacated the convictions, and remanded for further proceedings (Pet. App. 9a). The Second Circuit then denied the government's petition for rehearing (Pet. App. 65a).

This Court should deny the petition for a writ of certiorari.

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[10] Glenn Marcus was found *not guilty* of a third count, which charged him with transmitting "obscene" pictures on the Slavespace website, in violation of 18 U.S.C. § 1462 (A.27-28).

REASONS FOR DENYING CERTIORARI

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS

The government urges that the Second Circuit "departed from this Court's interpretation" of Rule 52(b) by finding plain error because of a "*possibility*" that the jury could have convicted Glenn Marcus based exclusively on pre-enactment conduct (Pet. I). The petition also argues that this standard conflicts with established law on plain error which holds that the "defendant cannot prevail when prejudice is extremely unlikely" (Pet. 7).

However, the Second Circuit's decision, remanding the erroneous convictions for a retrial, is not in conflict with any precedent from this Court. To the contrary, the Second Circuit accurately cited to the four-part test for plain error review enumerated in *United States v. Olano*, 507 U.S. 725 (1993). There, this Court held that to prevail on a plain error, the defendant must establish "(1) error (2) that is plain and (3) affects substantial rights." *Id.* at 732. In addition, (4) such discretion[11] is only appropriate "if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* at 736. (Pet. App. 6a).

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[11] Of course, whether or not to correct a forfeited error is always left to the sound discretion of the reviewing court. *Olano*, 507 U.S. at 732.

After careful consideration, the court concluded that all four of those standards were satisfied in Glenn Marcus' case (Pet. App. 7a-8a).[12] Specifically, the court found that the government presented evidence at trial of conduct that occurred both *before* and after the statutes were enacted. Moreover, the district court failed to instruct the jury with respect to this issue (Pet. App. 7a). Finally, the government *conceded* that the jury could have found Glenn Marcus guilty based solely on his pre-enactment conduct (Pet. App. 8a-9a). Based on these findings, it is apparent the court of appeals did not abuse its discretion and there is no basis for vacating its decision, which comports with the mandates of Rule 52(b) and *Olano*.

Nevertheless, the government contends that the Second Circuit deviated from the standards established by this Court in *Olano* and as fleshed out in subsequent cases.[13] In particular, the government urges that a defendant may not obtain relief on a "forfeited claim" where there is "no reasonable possibility" that the unobjected-to-error "had an effect on the judgment" (Pet. 11).

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[12] Significantly, in *Olano*, this Court confirmed that Rule 52(b) is *not* reserved solely for cases of actual innocence. 507 U.S. at 736.

[13] Citing *Johnson v. United States*, 520 U.S. 461 (1997), and *United States v. Cotton*, 535 U.S. 625 (2002).

However, this Court has never held that a circuit court cannot exercise its discretion in reviewing, for plain error, a constitutional violation that *may have affected* the judgment. The Solicitor General's cases do not require a "reasonable possibility" or probability that the error affected the judgment before a plain error will be noticed.

For example, in *Johnson*, this Court merely found that the fourth prong of the *Olano* test -- whether the forfeited error seriously affects the fairness, integrity or public reputation of the judicial proceeding -- was not satisfied where the evidence supporting the missing "materiality" element of a perjury conviction was "*overwhelming*" and "*essentially uncontroverted*" at trial. 520 U.S. at 469-70 (emphasis supplied). Thus, in *Johnson*, no "miscarriage of justice" would result from not correcting the error since there was no possibility that the trial was affected by the mistake.

Here, in marked contrast, Marcus' trial was flooded with evidence relating to *two full years of conduct before the statutes were even enacted*, while the proof relating to the post-enactment conduct only consisted of a period of 11 months! Moreover, unlike *Johnson*, where the error related to a matter that was "essentially uncontroverted," in the current case the government *concedes* that it was possible that the jurors convicted Glenn Marcus exclusively on conduct that occurred before the statutes were ever enacted! (Pet. App. 8a-9a).

Furthermore, the government's reliance on this Court's decision in *Cotton* is woefully misplaced where, as in *Johnson*, the defendant was not prejudiced by an error since the evidence at trial relating to that missing element was also "essentially uncontroverted" and "overwhelming." 535 U.S. at 633.

The government is endeavoring to create a conflict where, in fact, none exists. However, we urge that the petition slips into overstatement. And, given the grave consequences to Glenn Marcus, such a distraction is harrowing in its implications. This is especially so where the court of appeals certainly has not departed far from the accepted and usual course of judicial proceedings. At most, any alleged error merely consists of the misapplication of a properly stated rule of law.[14]

Here, the constitutional violation seriously affected Glenn Marcus' substantial rights, as well as the fairness of the judicial proceedings. And, significant public policy concerns arise in the face of the government's suggestion that fundamental, constitutional errors -- even those that affect the framework within which the trial proceeds -- cannot be entertained under the mantle of plain error. As a consequence, the petition for certiorari should be denied.

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[14] *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

II. THIS COURT'S DECISION IN *PUCKETT v. UNITED STATES* DOES NOT PROVIDE A BASIS FOR REMANDING TO THE COURT OF APPEALS FOR RECONSIDERATION

The government's reliance on *Puckett v. United States*, 129 S. Ct. 1423 (2009), for a grant of certiorari is misplaced as it is not an "intervening event" that warrants overturning the court of appeals' sound judgment. For example, *Puckett* does *not* "positively change" the presiding law governing plain error review.[15] Moreover, it certainly is not "sufficiently analogous" or "decisive" to compel reexamination of the case through a GVR order.[16] And, it does not even "cast doubt" on the court of appeals' judgment.[17]

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[15] *See United States v. Schooner Peggy*, 1 Cranch 103 (1801) ("if, subsequent to the judgment [entered by a lower court], and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied").

[16] *See Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964).

[17] *See Stutson v. United States*, 516 U.S. 163, 180 (1996) (Scalia, J., dissenting) (discussion of intervening events and GVR orders).

To the contrary, in *Puckett* the Court only addressed whether Rule 52(b)'s plain error test applies to forfeited claims where *the government failed to meet its obligations under a plea agreement.* 129 S. Ct. at 1428. There, the Court concluded that Rule 52(b) does, indeed, apply to unpreserved breach of contract claims. *Id.* In stark contrast, the government's petition in this case poses a highly distinguishable question relating to what is the proper standard for plain error review concerning constitutional violations involving the Ex Post Facto Clause (Pet. App. I).

Moreover, *Puckett* is nothing more than a restatement of the existing law relating to plain error review, rather than an intervening decision that would change the outcome. *See Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (GVR only warranted where there is a "reasonable probability" that, in light of an intervening decision, the court of appeals would "reject the legal premise on which it relied").

The lack of any change in precedent regarding the standards for plain error review is evident in *Puckett* where the Court concluded that forfeited breach of plea agreement claims are reviewed for plain error "*in the usual fashion.*" 129 S. Ct. at 1428 (emphasis supplied). The uneventful and banal application of existing law is further underscored by language used in the decision itself, where the Court acknowledged that it is merely restating the well-established standard for plain error review.[18]

Furthermore, the Court's statement in *Puckett* regarding "unwarranted extensions" of the authority granted under Rule 52(b) is not new law (Pet. 16-17). Instead, the Court prefaced that statement with the phrase "[w]e have repeatedly cautioned that...," which gives clear notice that there was no change in the law. *Puckett*, 129 S. Ct. at 1429.

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[18] *See, e.g., Puckett*, 129 S. Ct. at 1429 ("We explained in *United States v. Olano*, [citations omitted] that Rule 52(b) review -- so-called 'plain-error review' -- involves four steps, or prongs"). The Court in *Puckett* then reiterated the same four-part *Olano* test that the Second Circuit applied in reviewing the Ex Post Facto Clause violation in this case (Pet. App. 6a).

In addition, the government urges that *Puckett* requires a case specific inquiry into whether the error constitutes a miscarriage of justice (Pet. 17). However, that is certainly not a new rule or change in the law. In fact, in *Puckett* the Court cited to a decision, harkening back to 1985, for the settled proposition that a "*per se* approach to plain-error review is flawed."[19] Thus, *Puckett* clearly does not warrant disturbing the decision of the Second Circuit.

Astonishingly, the Solicitor General contends that the court of appeals "entirely failed to examine the evidence establishing the absence of any real possibility that the jury would have found guilt based solely on pre-enactment conduct" (Pet. 18). However, this completely ignores the government's *concession* that the "jury could have found" that Marcus violated the Sex Trafficking and Forced Labor statutes "solely by his conduct prior to their effective dates" (Pet. App. 8a-9a). The Second Circuit then chronicled specific evidence, which the government conceded established all of the elements of the offenses before the statutes' enactment (Pet. App. 9a).

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[19] *Puckett*, 129 S. Ct. at 1433, quoting *United States v. Young*, 470 U.S. 1, 17 n. 14 (1985).

Finally, several members of this Court have criticized overly expansive uses of GVR orders.[20] Here, a GVR order is not proper since there is no intervening change in the law. As a consequence, the petition should be denied.

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[20] *See, e.g., Youngblood v. West Virginia*, 547 U.S. 867, 871 (2006) (Scalia, Thomas and Kennedy, JJ., dissenting). Significantly, in *Nunez v. United States*, 128 S. Ct. 2990, 2990-91 (2008), Chief Justice Roberts and Justice Thomas joined Justice Scalia in dissenting from a GVR. The Justices urged that the Court has "no power to set aside (vacate) another court's judgment" unless the Supreme Court finds the judgment to be in error.

III. REVIEW IS UNNECESSARY BECAUSE THE SECOND CIRCUIT'S APPROACH IS ALIGNED WITH OTHER CIRCUITS

The Petitioner also contends that the Second Circuit's approach to plain error review of constitutional claims is at odds with authority from other circuits (Pet. 12). However, the Second Circuit's equitable approach, which considers whether there was "any possibility" that the jury could have relied on pre-enactment conduct in reaching a guilty verdict, is fully aligned with decisions from other circuits.

For example, in *United States v. Pitre*, 504 F.3d 657, 662 (7th Cir. 2007), the Seventh Circuit recently found that in cases where a defendant's right to allocution has been violated, "a reviewing court should presume prejudice when there is *any possibility* that the defendant would have received a lesser sentence had the district court heard from [her] before imposing sentence."[21]

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[21] *Id.* quoting *United States v. Luepke*, 495 F.3d 443, 451 (7th Cir. 2007) (emphasis supplied). The Solicitor General's reliance on *United States v. Julian*, 427 F.3d 471 (7th Cir. 2005), is misplaced where that decision *predates* the court of appeals' decision in *Pitre*.

The Seventh Circuit explained the rational underlying the more humane "any possibility" approach and underscored the "quandary facing a defendant who must prove prejudice resulting from a violation of the right of allocution." *Pitre*, 504 F.3d at 662. The court also recognized that it

> would be almost impossible to determine whether, in the context of the advisory guidelines and the court's balancing of the statutory sentencing factors, a defendant's statement, that was never made, would have altered the conclusions of the sentencing court.

As a result, the Seventh Circuit reasoned that the "right to allocution, properly afforded, *could have* had such influence is the most we reasonably can expect a defendant to demonstrate."[22] Notably, the Eleventh Circuit also applies the "possibility" of prejudice standard for plain error review where a defendant was not given an opportunity to allocute. *See, e.g., United States v. Carruth*, 528 F.3d 845, 847 n. 4 (11th Cir. 2008).

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[22] *Id.* quoting *Luepke*, 495 F.3d at 451 (emphasis in original). *See also United States v. Williams-Davis*, 90 F.3d 490, 510 (D.C. Cir. 1996) (rejecting unpreserved Ex Post Facto claim where there was "*no possibility* that the jury finding could have rested solely on conduct preceding the critical date") (emphasis supplied).

Furthermore, no conflict exists among the circuits on this issue. Specifically, in the cases relied upon by the government, the courts essentially found that the evidence relating to the defendants' post-enactment conduct was so overwhelming that no reasonable jury could have convicted the defendants based solely on pre-enactment conduct.[23]

Here, however, there were substantial differences between the pre-enactment and post-enactment evidence. For example, the record establishes that days *after* the Forced Labor statute went into effect *Jodi began to work full-time outside of the apartment in a regular office*. Therefore, her testimony that, during this period, she was also working 8 to 10 hours a day on the website is highly implausible. As a consequence, in contrast to the cases cited by the government, there is a real possibility that the jury only credited Jodi's testimony relating to pre-enactment conduct and, thus, convicted Glenn Marcus based solely on that evidence.

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[23] For instance, in *United States v. Munoz-Franco*, 487 F.3d 25, 57 (1st Cir. 2007), the court saw "nothing to differentiate [the defendants'] pre-enactment conduct from subsequent conduct." Similarly, in *United States v. Todd*, 735 F.2d 146, 150 (5th Cir. 1984), the court noted that the majority of the charged conduct occurred "during the effective period of the amendment."

A National Approach is Not Required

In addition, courts of appeals are allowed broad discretion in how they supervise litigation within their courts. Thus, even if some courts may differ slightly in their review of plain error claims, reconsideration is not warranted here because a uniform national rule is not required for this procedural issue.

The choice of which procedural approach to adopt does not require a uniform national solution. For example, in *Ortega-Rodriguez v. United States*, 507 U.S. 234, 251 n.24 (1993), this Court recognized that uniformity among the circuits is not necessary in their approach to fugitive dismissal rules. The Court also noted "so long as all circuit rules meet the threshold reasonableness requirement ... they may vary considerably in their operation." Therefore, the Court declined to require a uniform rule for the determination as to when pre-appeal flight would warrant dismissal of an appeal. Instead, the Court left that question to the "various courts of appeals." *Id.*

We also urge, most respectfully, that review is not appropriate in such a factually intense case. *See, e.g.*, Rule 10. Here, the government *conceded* that there were sufficient facts to justify Glenn Marcus' convictions for both Forced Labor and Sex Trafficking based exclusively on pre-enactment conduct (Pet. App. 8a-9a). Any questions relating to that issue are, effectively, rendered moot by this critical concession.

Furthermore, the result in this case is not unfair to the government. The Second Circuit, after carefully considering the issue for seven months, remanded for a retrial. The issues are relatively straightforward, especially since the jury acquitted Glenn Marcus of the obscenity charge. And, in light of the nine-year sentence facing Marcus, as well as the fact that the initial jury deliberated for seven days, it is only fair that any questions should be resolved in Glenn Marcus' favor.

Here, there certainly was an (1) error, (2) that was plain, and (3) that affects Glenn Marcus' substantial rights. The constitutional violation also seriously affected the fairness, integrity and public reputation of the judicial proceedings. Thus, there is no reason to unsettle the decision of the court of appeals.

Finally, in the event the Court believes that the court of appeals' rule stands in conflict with authority from this Court or from other circuits, then plenary review -- rather than a GVR order -- would be the proper course to follow.

CONCLUSION

The petition for a writ of certiorari should be denied.

July 1, 2009

Respectfully submitted,

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REPLY BRIEF

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GLENN MARCUS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In this case, the Second Circuit held that a reviewing court must grant relief on a forfeited ex post facto claim "whenever there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct." Pet. App. 10a. The court further concluded that this standard was satisfied because the government's evidence of pre-enactment conduct, standing alone, would have been legally sufficient to support a conviction. *Id.* at 8a-9a. Respondent denies that this decision conflicts with this Court's established precedent governing plain-error review or with the decisions of other circuits. He also argues that this Court should not grant the petition for a writ of certiorari, vacate the court of appeals' judgment, and remand for further consideration (GVR) in light of *Puckett* v. *United States*, 129 S. Ct. 1423 (2009), because *Puckett* does not alter the existing standards for plain-error review and because "a uniform national rule is not required

for this procedural issue." Br. in Opp. 24. None of those contentions has merit, and the Court should GVR in light of *Puckett* so that the Second Circuit can bring its precedent on plain-error review of asserted ex post facto violations into alignment with this Court's jurisprudence.

A. The Second Circuit's Decision Conflicts With This Court's Decisions

Respondent is correct (Br. in Opp. 12) that the Second Circuit began its discussion by reciting the four-factor test articulated in *United States* v. *Olano*, 507 U.S. 725 (1993). Pet. App. 6a. But the court of appeals' analysis of the plain-error issue (*id.* at 8a-9a) departed from the *Olano* factors in favor of the separate test set forth in *United States* v. *Torres*, 901 F.2d 205 (2d Cir.), cert. denied, 498 U.S. 906 (1990)—which was decided three years before *Olano* and "did not apply [this Court's] current four-part plain error analysis." Pet. App. 14a (concurring opinion). The court did not explain how *Torres*'s approach can be squared with either *Olano* or the Court's subsequent decisions in *Johnson* v. *United States*, 529 U.S. 694 (2000), and *United States* v. *Cotton*, 535 U.S. 625 (2002). Indeed, as the two concurring judges explained (Pet. App. 14a), the Second Circuit has "never directly addressed" that issue in any of its post-*Olano* decisions.

The petition for a writ of certiorari challenges the court of appeals' view, based on *Torres*, that reversal is required "whenever there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct." Pet. App. 10a. Respondent is wrong to assert that the Second Circuit's error in this case "merely consists of the misapplication of a properly stated rule of law," Br. in Opp. 15, and that the issue presented by this petition for a writ of certiorari is "factually intens[ive]," *id.*

at 24. As the petition explained, the relevant legal rules in this context are that: (1) "a defendant may not obtain relief on a forfeited claim 'where there is no reasonable possibility that' the unobjected-to error 'had an effect on the judgment,'" Pet. 11 (quoting Pet. App. 14a (concurring opinion)); and (2) even when a defendant has shown a clear error affecting substantial rights, the court must engage in "an additional, case-specific inquiry" into whether relief is necessary to protect the fairness, integrity, or public reputation of judicial proceedings. Pet. 17. Those are not the rules the panel applied in this case. To the contrary, the panel expressly declined to consider the government's argument that there was only "a 'remote possibility' that the jury relied exclusively on pre-enactment conduct." Pet. App. 10a. The panel also attached no significance to the concurring judges' observation that respondent's conduct with respect to the forced labor count "was materially indistinguishable before and after the enactment of the" relevant statute. *Id.* at 18a. Instead, the panel concluded that respondent's forced labor conviction "*must* be vacated" solely because the government's evidence of pre-enactment conduct would have been legally sufficient to support a conviction. *Id.* at 9a (emphasis added); see *id.* at 8a-10a.[1]

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[1] Contrary to petitioner's contention, the government has never "concede[d]" that the jury's verdict may actually have been based on pre-enactment conduct alone. Br. in Opp. 14 (emphasis omitted); see *id.* at 2, 19. Instead, the government has acknowledged only that the evidence of pre-enactment conduct, standing alone, would have been sufficient to support a conviction. Pet. App. 8a-9a (quoting government's brief). That is not sufficient to support reversal under a proper application of plain-error review. Even if the evidence of pre-enactment conduct would have been sufficient, a conviction should be affirmed if, in light of the post-enactment evidence, there is no reasonable probability that the jury actually relied exclusively on pre-enactment conduct.

Respondent asserts that "a uniform national rule is not required for this procedural issue," Br. in Opp. 24, and that the Second Circuit "did not abuse its discretion" in granting relief in this case, *id.* at 13. But Congress and this Court have determined that a uniform rule is warranted by promulgating Federal Rule of Criminal Procedure 52(b), which, like the rest of the Criminal Rules, "govern[s] the proceedings in *all* criminal proceedings in * * * the United States courts of appeals." Fed. R. Crim. P. 1(a)(1) (emphasis added).[2] And this Court's decisions establish that courts of appeals have no free-standing "discretion" to correct a forfeited error absent compliance with the standards described in this Court's decisions. See, *e.g.*, *Cotton*, 535 U.S. at 631 (stating that a court "may * * * exercise its discretion to notice a forfeited error * * * *only* if" all four requirements set forth in *Olano* are satisfied) (quoting *Johnson* v. *United States*, 520 U.S. 461, 467 (1997)) (emphasis added).

B. The Circuit Conflict Is Real

1. Respondent does not deny that the court of appeals' decision in this case conflicts with the Seventh Circuit's decision in *United States* v. *Julian*, 427 F.3d 471 (2005), cert. denied, 546 U.S. 1220 (2006). Instead, respondent suggests (Br. in Opp. 21 n.21) that *Julian* is irrelevant because it "*predates* the [Seventh Circuit's subsequent] decision in" *United States* v. *Pitre*, 504 F.3d 657 (2007). But

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[2] In contrast, this Court's decision in *Ortega-Rodriguez* v. *United States*, 507 U.S. 234 (1993) (see Br. in Opp. 24), involved an issue—whether a criminal defendant who flees while his case is pending forfeits his statutory right to appeal—that was not directly addressed by a statute or federal rule. See *id.* at 244 (noting that the particular fugitive-dismissal rule at issue in that case had been promulgated by the Eleventh Circuit in its "supervisory capacity").

Pitre does not mention, much less disavow, *Julian*, and the error at issue in *Pitre* (a failure to provide a criminal defendant with an opportunity to address the court before a sentence was pronounced) differs significantly from the sort of ex post facto violation that respondent asserts here. See *id.* at 661-663. In addition, *Pitre* ultimately denied relief under *Olano*'s fourth prong after conducting precisely the sort of case-specific inquiry that the Second Circuit should have conducted but failed to undertake here. See *id.* at 663 (concluding that, "on the facts of this case," the district court's failure to grant the defendant her right to allocute "did not seriously affect the fairness, integrity or public reputation of her revocation proceedings").

Respondent also fails to refute the conflict with the First and Fifth Circuits. As the petition for a writ of certiorari explained (see Pet. 13-14), the First Circuit's decision in *United States* v. *Muñoz-Franco*, 487 F.3d 25, cert. denied, 128 S. Ct. 678, 128 S. Ct. 679, and 128 S. Ct. 682 (2007), was not based on the "overwhelming" nature of the government's evidence of post-enactment conduct. Br. in Opp. 23. To the contrary, the *Muñoz-Franco* court denied relief because there was "nothing to *differentiate* [the defendants'] pre-enactment conduct from subsequent conduct" and because it was "*implausible* that the jury would" have credited only the parts of the testimony of a key government witness that dealt with pre-enactment conduct. 487 F.3d at 57-58 (emphases added). The Fifth Circuit likewise did not describe the evidence of post-enactment conduct as "overwhelming" in *United States* v. *Todd*, 735 F.2d 146 (1984), cert. denied, 469 U.S. 1189 (1985). Instead, the court observed that the record "clearly establishe[d] violations of the amended act by the appellants" during the post-enactment period, and noted that "*[m]ost* of the evidence

focused on events that occurred" after that date. *Id.* at 150 (emphasis added).

Even if respondent's characterizations of *Muñoz-Franco* and *Todd* were correct, the conflict would remain. Respondent asserts that those decisions "found that the evidence relating to the defendants' post-enactment conduct was so overwhelming that *no reasonable jury* could have convicted the defendant based solely on pre-enactment conduct." Br. in Opp. 23 (emphasis added). But that is precisely the sort of inquiry—one that looks to the weight of the pre- and post-enactment evidence and seeks to discern what a reasonable jury might and might not have done—that the Second Circuit expressly refused to undertake here. See Pet. App. 10a (declining to consider the government's argument that there was only "a 'remote possibility' that the jury relied exclusively on pre-enactment conduct").

Respondent suggests (Br. in Opp. 23) that this case stands in contrast to *Muñoz-Franco* and *Todd* because here, unlike in those cases, "there were substantial differences between the pre- and post-enactment evidence" and "there is a real possibility that the jury only credited [the victim's] testimony relating to pre-enactment conduct." That claim provides no basis for declining to remand this case so that the Second Circuit can conform its law to this Court's decisions, and then apply the correct standard to the facts. As the petition for a writ of certiorari explained (see Pet. 6-7), the two concurring judges—whose votes were necessary to support the judgment—expressly disagreed with petitioner's assessment of the record. See Pet. App. 11a, 17a-18a (stating that the identification of the proper standard for reviewing respondent's forfeited ex post facto claim "affects the outcome of this appeal" because, with respect to respondent's forced labor conviction,

the "relevant conduct was materially indistinguishable before and after the enactment of the statute"). And petitioner never offered his current account of the evidence in the court below. See Pet. C.A. Letter Br. (Jan. 18, 2008) (filed in response to court's questions concerning ex post facto issues). The court of appeals should thus address those case-specific issues in the first instance.

2. The Second Circuit's decision is also diametrically opposed to the Eleventh Circuit's unpublished decision in *United States* v. *Paulin*, No. 08-13124, 2009 WL 1459700 (May 27, 2009) (per curiam), which was issued after the petition for a writ of certiorari was filed. As in this case, the defendant in *Paulin* was charged with violating the Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. L. No. 106-386, 114 Stat. 1464, the government presented evidence at trial about the defendant's conduct both before and after the effective date of the TVPA, and the defendant argued for the first time on appeal that her conviction violated the Ex Post Facto Clause. *Paulin*, 2009 WL 1459700, at *1. The Eleventh Circuit denied relief under the plain-error standard. Unlike in this case, the *Paulin* court did not ask whether the evidence of pre-enactment conduct, standing alone, would have been legally sufficient to support a conviction. Instead, it affirmed the defendant's conviction because it had "no doubt that the jury would have decided the case the same way if the evidence had been limited to [the defendant's] conduct after * * * the effective date of the TVPA." *Id.* at *2 (internal quotation marks and citation omitted). Although non-precedential, the Eleventh Circuit's approach reinforces the settled principle that plain-error review precludes reversal based only on a theoretical possibility of prejudice. And that rule serves the interests of courts, the community, witnesses,

and victims in avoiding retrials when the error had no effect on the outcome.

C. A GVR In Light Of *Puckett* Is Appropriate

The government agrees with respondent that *Puckett* v. *United States*, 129 S. Ct. 1423 (2009), does not fundamentally change the nature of review under the plain-error standard. See Pet. 7-8 (stating that *Puckett* "reaffirmed several bedrock propositions about the nature of plain-error review"). But the additional conflict between the Second Circuit's decision in this case and this Court's pre-*Puckett* decisions (see Pet. 8-12) does not lessen the appropriateness of a GVR in light of *Puckett*. To the contrary, the Court frequently enters GVR orders in the wake of decisions that could be viewed as simply restating and clarifying pre-existing law. See, *e.g.*, *Knowles* v. *Mirzayance*, 549 U.S. 1199 (2007) (GVR'd in light of *Carey* v. *Musladin*, 549 U.S. 70 (2006), which addressed the standards for determining whether a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" for purposes of 28 U.S.C. 2254(d)(1)); *Barnette* v. *United States*, 546 U.S. 803 (2005) (GVR'd in light of *Miller-El* v. *Dretke*, 545 U.S. 231 (2005), which involved the proper application of *Batson* v. *Kentucky*, 476 U.S. 79 (1986)); *Synder* v. *Louisiana*, 545 U.S. 1137 (2005) (same); *Kandies* v. *Polk*, 545 U.S. 1137 (2005) (same); *Hightower* v. *Schofield*, 545 U.S. 1124 (2005) (same); *Walker* v. *True*, 540 U.S. 1013 (2003) (GVR'd in light of *Wiggins* v. *Smith*, 539 U.S. 510 (2003), which applied the test for ineffective assistance of counsel first stated in *Strickland* v. *Washington*, 466 U.S. 668 (1984)); *Grant* v. *Oklahoma*, 540 U.S. 801 (2003) (same). At any rate, respondent does not attempt to explain how the Second Circuit's "any possibility" standard can be squared with *Puckett*'s

statement that a defendant cannot satisfy his "usual burden of showing prejudice" under the third prong of plain-error review when the defendant "likely would not have" been better off in the absence of the relevant error. See Pet. 17 (emphasis omitted) (quoting *Puckett*, 129 S. Ct. at 1432-1433).

Respondent also notes (Br. in Opp. 20) that "several members of this Court have criticized overly expansive uses of GVR orders." But that controversy has no relevance here. Even the Justices who have objected to certain GVRs have acknowledged that a GVR is appropriate "where an intervening factor has arisen [*e.g.*, new legislation or a recent judgment of this Court] that has a legal bearing upon the decision." *Youngblood* v. *West Virginia*, 547 U.S. 867, 871 (2006) (Scalia, J., dissenting) (citation omitted). *Puckett* is such an "intervening factor" because it was issued more than seven months after the panel's decision in this case. And because there is at least "a reasonable probability" that the panel would reach a different result were this Court to remand for further consideration in light of *Puckett*, a GVR is appropriate. See *Lawrence* v. *Chater*, 516 U.S. 163, 166-167 (1996) (per curiam).[3]

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted, the judgment of the court of appeals

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[3] The government agrees with respondent with respect to one point, however. If the Court were to conclude that the court of appeals' decision conflicts with the decisions of this Court or other circuits, but that this Court's pre-*Puckett* decisions were sufficiently clear to prevent *Puckett* from constituting an "intervening" decision for purposes of granting a GVR, then the Court should grant the petition for a writ of certiorari and schedule the case for full briefing and argument. See Br. in Opp. 25.

should be vacated, and the case should be remanded for further consideration in light of *Puckett* v. *United States*, 129 S. Ct. 1423 (2009). In the alternative, the petition for a writ of certiorari should be granted and the case should be set for full briefing and argument.

Respectfully submitted.

ELENA KAGAN
Solicitor General

JULY 2009

PETITIONER'S BRIEF

No. 08-1341

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GLENN MARCUS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals departed from the Court's interpretation of Rule 52(b) of the Federal Rules of Criminal Procedure by adopting as the appropriate standard for plain-error review of an asserted ex post facto violation whether "there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct."

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 538 F.3d 97. The opinion and order of the district court (Pet. App. 19a-64a) is reported at 487 F. Supp. 2d 289.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2008. A petition for rehearing was denied on December 8, 2008 (Pet. App. 65a-66a). On February 27, 2009, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 7, 2009. On March 26, 2009, Justice Ginsburg further extended the time to May 7, 2009. The petition for a writ of certiorari was filed on May 1, 2009, and was

granted on October 13, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Ex Post Facto Clause of the United States Constitution (Art. I, § 9, Cl. 3) provides: "No * * * ex post facto Law shall be passed."

Federal Rule of Criminal Procedure 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, respondent was convicted of sex trafficking, in violation of 18 U.S.C. 1591(a)(1), and forced labor, in violation of 18 U.S.C. 1589. He was sentenced to 108 months of imprisonment. The court of appeals vacated respondent's convictions and remanded for further proceedings. Pet. App. 1a-18a.

1. In 1998, respondent met a woman named Jodi in an online chat room devoted to sexual practices involving bondage, domination, and sadomasochism.[1] In October 1998 and again the next month, Jodi traveled to Maryland from her home in the Midwest. While there, she met respondent, who lived in New York, at an apartment belonging to a woman named Joanna, who was one of what respondent called his "slaves." In January 1999, Jodi moved in with Joanna. Thereafter, respondent visited Joanna's home every one to two weeks to engage in

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[1] The district court permitted certain witnesses to testify using only their first names. Pet. App. 2a n.1.

violent sexual activity with Jodi, Joanna, and sometimes other women as well. Pet. App. 2a-3a.

In October 1999, Jodi told respondent that she wanted to end her relationship with him. In response, respondent subjected her to a "punishment" that involved severe physical abuse. From then on, Jodi's relationship with respondent was nonconsensual. Pet. App. 3a; see *id.* at 26a-27a (describing incident).

In January 2000, respondent ordered Jodi to move to New York and live with a woman named Rona, another of respondent's "slaves." At respondent's direction, Jodi created a sexually explicit website called "Slavespace," and she worked between eight and nine hours per day on the website. Respondent received all of the resulting income, which consisted principally of membership fees and advertising revenue. Respondent continued to engage in violent, nonconsensual sexual behavior with Jodi, and he punished her severely when he was dissatisfied with her work. When Jodi told respondent that she wanted to leave, he threatened to send pictures to her family and the media. Pet. App. 4a; see *id.* at 28a-29a.

In March 2001, respondent told Jodi that he would allow her to leave him, but that she would first have to endure an additional punishment. Respondent drove Jodi to the home of a woman named Sherry, where he struck Jodi's head against a ceiling beam, tied her hands and ankles to the beam, beat and whipped her while she was hanging from the beam, drugged her, and had sexual intercourse with her. Respondent photographed the incident and forced Jodi to write about it for his website. Jodi continued to live with Rona until August 2001, when Jodi moved into her own apartment. At that point, Jodi's interactions with respondent became less fre-

quent, although she remained in contact with him until 2003. Pet. App. 4a-5a.

2. A grand jury returned an indictment charging respondent with distribution of obscene materials through an interactive computer service, in violation of 18 U.S.C. 1462; sex trafficking, in violation of 18 U.S.C. 1591(a)(1); and forced labor, in violation of 18 U.S.C. 1589. Pet. App. 5a-6a & n.4. The latter two statutes were enacted as part of the Trafficking Victims Protection Act of 2000 (TVPA), Pub. L. No. 106-386, Div. A, § 112(a)(2), 114 Stat. 1466, which became law on October 28, 2000. The superseding indictment, however, charged a course of conduct that occurred "between January 1999 and October 2001." Pet. App. 5a-6a.

At trial, the government presented evidence about respondent's conduct both before and after the effective date of the TVPA. Respondent did not object to the introduction of evidence pertaining to periods before the TVPA's enactment, nor did he request an instruction that would have limited the jury's consideration of such evidence. He likewise failed to raise the issue in his motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29. The jury found respondent not guilty of the obscenity offense, but guilty of both the sex-trafficking and the forced-labor offenses. Pet. App. 6a & n.4.

3. The court of appeals vacated respondent's convictions and remanded for further proceedings. Pet. App. 1a-18a.

a. The court of appeals observed that respondent "argue[d] for the first time on appeal that the TVPA has been applied retroactively in his case in violation of the Ex Post Facto Clause of the United States Constitution." Pet. App. 6a; see U.S. Const. Art. I, § 9, Cl. 3.

The court stated that, "[b]ecause [respondent] failed to raise this argument before the District Court, it is reviewed for plain error." Pet. App. 6a; see Fed. R. Crim. P. 52(b).

The court of appeals concluded that "[t]his case * * * clearly implicates the Ex Post Facto Clause" because the jury was permitted to consider evidence of conduct that pre-dated the enactment of the TVPA. Pet. App. 7a. Relying on its decision in *United States* v. *Torres*, 901 F.2d 205 (2d Cir.), cert. denied, 498 U.S. 906 (1990), the court stated that "if it was *possible* for the jury—who had not been given instructions regarding the date of enactment—to convict *exclusively* on pre-enactment conduct, then the conviction constitutes a violation of the Ex Post Facto Clause." Pet. App. 8a. The court added that such a possibility requires vacatur of a conviction, "even under plain error review." *Ibid.* Applying that standard, the court concluded that *Torres* required vacatur because it was possible that the jury relied solely on pre-enactment conduct. The court explained that the jury heard "evidence * * * that established [that] all of the elements of" the sex-trafficking and forced-labor offenses were present before the effective date of the TVPA. *Id.* at 9a. The court rejected the government's argument that vacatur was not warranted because the possibility that the jury relied solely on pre-enactment conduct was "remote," reasoning that it must vacate "whenever there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct." *Id.* at 10a.

b. Then-Judge Sotomayor filed a concurring opinion, which Judge Wesley joined. Pet. App. 10a-18a. In their view, the panel's decision was "compelled by the current law of this circuit," but the Second Circuit's "precedent

with regard to plain-error review of ex post facto violations does not fully align with the principles inhering in the Supreme Court's recent applications of plain-error review." *Id.* at 10a-11a. In particular, they emphasized that the *Torres* standard "appears to conflict with" *United States* v. *Cotton*, 535 U.S. 625 (2002), and *Johnson* v. *United States*, 520 U.S. 461 (1997). Pet. App. 11a. Under those cases, "where there is no reasonable possibility that an error not objected to at trial had an effect on the judgment, the Supreme Court counsels us against exercising our discretion to notice that error." *Id.* at 14a. The Second Circuit's standard conflicts with that approach, the concurring judges stated, "because it requires a retrial whenever there is any factual possibility that a jury could have convicted a defendant based exclusively on pre-enactment conduct, even if such a scenario is highly implausible." *Ibid.*

The concurring judges stated that, applying the correct plain-error test, under which a court should affirm if there is not a "reasonable possibility" that the jury convicted exclusively on pre-enactment conduct, they would order a retrial on respondent's sex-trafficking count. Pet. App. 15a-17a. With respect to the forced-labor conviction, however, they concluded that the identification of the proper standard for reviewing respondent's forfeited ex post facto claim "affects the outcome of this appeal." *Id.* at 11a. The concurring judges reasoned that respondent's "relevant conduct was materially indistinguishable" with respect to the forced-labor conviction during the pre- and post-enactment periods, and that respondent had not "offer[ed] any explanation of how his pre- and post-enactment conduct differed in any relevant way." *Id.* at 17a-18a. Because that was so, the concurring judges saw "no reasonable possibility

that the jury would have convicted him based only on his pre-enactment conduct." *Id.* at 18a. Accordingly, they would have affirmed respondent's forced-labor conviction under what they believed to be this Court's standard for plain-error review. *Ibid.*

4. The government filed a petition for rehearing en banc, which the court of appeals denied. Pet. App. 65a-66a.

SUMMARY OF ARGUMENT

The court of appeals applied an incorrect standard for determining whether respondent's forfeited claim of error under the Ex Post Facto Clause warrants relief on plain-error review. Its judgment should therefore be reversed and the case remanded for application of the correct standard.

Rule 52(b) of the Federal Rules of Criminal Procedure provides courts of appeals with a limited authority to correct errors that were forfeited because they were not raised in the district court. It states that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." This Court has held that, under Rule 52(b), "before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997) (brackets in original) (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)). If those requirements are satisfied, the court may exercise its discretion to notice the error, but only if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (brackets in original) (citation omitted).

Under Rule 52(b), a reviewing court cannot reverse unless the defendant carries the burden to show a plain error affecting substantial rights. But even if a reviewing court assumes or finds that the defendant has made this showing, the court may not notice the forfeited error unless it seriously affected the fairness, integrity, or public reputation of the proceeding. The defendant normally cannot meet that burden when there is no reasonable possibility that, but for the error, the outcome of the proceeding would have been different. Indeed, on the fourth prong of plain-error review, an appellate court considering the type of instructional error alleged here could appropriately decline to exercise its discretion to reverse even when such a reasonable possibility exists—for example, when the circumstances nonetheless indicate that the error did not actually affect the outcome.

The court of appeals departed from those principles by holding that, whenever a defendant asserts a forfeited claim based on the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, reversal is required if there is "any possibility, no matter how unlikely, that the jury could have convicted based exclusively on" conduct that pre-dated the enactment of the statute, Pet. App. 10a. The court offered no reason why ex post facto claims should be treated differently from other kinds of claims, and it could not have done so. To the contrary, this Court has made clear that all forfeited claims, no matter how serious, are subject to the same standard of plain-error review.

The concurrence in the court of appeals correctly concluded that there is no reasonable possibility that the jury relied exclusively on pre-enactment conduct in convicting respondent on the forced-labor count because his

pre-enactment and post-enactment conduct was materially indistinguishable. The failure of the instructions to address this issue therefore did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. Because the court of appeals did not reach that issue, however, this Court should reverse the judgment below and remand to allow the court of appeals to apply the correct plain-error standard to this case.

ARGUMENT

AN APPELLATE COURT MAY NOT NOTICE A FORFEITED EX POST FACTO ERROR UNLESS THE DEFENDANT CAN ESTABLISH A REASONABLE POSSIBILITY THAT IT AFFECTED THE OUTCOME OF THE PROCEEDING

A. Rule 52(b) Precludes A Court Of Appeals From Noticing A Forfeited Error Unless There Is A Reasonable Possibility That The Error Affected The Judgment

1. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Federal Rule of Criminal Procedure 52(b)—the plain-error rule—"tempers the blow of a rigid application of the contemporaneous-objection requirement," *United States* v. *Young*, 470 U.S. 1, 15 (1985), by "provid[ing] a court of appeals a limited power to correct errors that were forfeited because not timely raised in district court," *Olano*, 507 U.S. at 731. The rule thus strikes a "careful balanc[e]" between "our need to encourage all trial participants to seek a fair and accurate trial the first time

around [and] our insistence that obvious injustice be promptly redressed." *United States* v. *Frady*, 456 U.S. 152, 163 (1982).

Rule 52(b) protects important values in the judicial system. It promotes finality and judicial economy by requiring claims of error to be raised in the trial court—where they can be examined with the benefit of fresh recollections and errors can be corrected on the spot—in order to receive full consideration on appeal. See *United States* v. *Vonn*, 535 U.S. 55, 73 (2002) ("[T]he value of finality requires defense counsel to be on his toes, not just the judge."); *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977) (contemporaneous-objection rule "encourages the result that [trial] proceedings be as free of error as possible"). It "reduce[s] wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 82 (2004). And it diminishes opportunities and incentives for gamesmanship by discouraging a party from silently acquiescing in error in the trial court and then using that error—"pull[ing] the ace out of his sleeve," *United States* v. *Busche*, 915 F.2d 1150, 1151 (7th Cir. 1990)—to gain reversal on appeal should the trial outcome be unsatisfactory. *Vonn*, 535 U.S. at 73; *Luce* v. *United States*, 469 U.S. 38, 42 (1984); *Wainwright*, 433 U.S. at 89.

To achieve those objectives, Rule 52(b) imposes three "limitation[s] on appellate authority" to grant relief based on forfeited claims. *Olano*, 507 U.S. at 732. The rule states that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). In *Olano*, this Court held that, "before an appellate court can correct an error not raised at trial, there

must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997) (brackets in original) (quoting *Olano*, 507 U.S. at 732). When all three requirements are satisfied, "the court of appeals has authority to order correction, but [it] is not required to do so." *Olano*, 507 U.S. at 735. Instead, a reviewing court "may * * * exercise its discretion to notice a forfeited error" only if a fourth condition is satisfied: "the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson*, 520 U.S. at 467 (brackets in original) (citation omitted).

2. In referring to "substantial rights," Rule 52(b) uses the same language as Rule 52(a), which states that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). "[I]n most cases," this Court has explained, that language "means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734.[2]

When a defendant seeks relief based on a forfeited claim of error, it is the defendant who bears the burden of showing prejudice. *Olano*, 507 U.S. at 734-745; see *Dominguez Benitez*, 542 U.S. at 83 (on plain-error review, a defendant who seeks reversal for a violation of

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[2] If properly preserved, certain errors that "affect[] the framework within which the trial proceeds"—*i.e.*, "structural" errors—result in reversal without regard to an assessment of prejudice. *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991). In the plain-error context, this Court has reserved the question whether structural errors automatically affect substantial rights. *Puckett* v. *United States*, 129 S. Ct. 1423, 1432 (2009). In any event, structural errors are a "very limited" category of errors, which does not include jury-instruction errors that occur within "the trial process itself." *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (citations omitted).

Federal Rule of Criminal Procedure 11 at his guilty-plea colloquy "must show a reasonable probability that, but for the error, he would not have entered the plea"); *Vonn*, 535 U.S. at 62 (on plain-error review, "the tables are turned" and the defendant must show an effect on his substantial rights). In the harmless-error context, this Court has held that, to determine whether a constitutional error was prejudicial, the reviewing court must ask "whether there is a reasonable possibility that the [error] complained of might have contributed to the conviction." *Chapman* v. *California*, 386 U.S. 18, 23 (1967) (quoting *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963)). Thus, to show that a forfeited constitutional error had an effect on substantial rights, a defendant must show at least a reasonable possibility that, but for the error, the outcome of the proceeding would have been different.

3. Even when an error affects substantial rights under *Olano*'s third prong (or is assumed to do so), *Olano*'s fourth prong limits reversal to cases in which the error seriously impairs the fairness or reliability of the proceedings. In cases involving instructional error, this Court's decisions in *Johnson*, *supra*, and *United States* v. *Cotton*, 535 U.S. 625 (2002), make clear that a reviewing court should not exercise its discretion to correct the error when, for example, the relevant evidence is "overwhelming" and "essentially uncontroverted." Pet. App. 14a (concurring opinion); see *id.* at 11a-13a.

In *Johnson*, the jury instructions in a perjury case omitted the element of materiality. 520 U.S. at 464. This Court determined that an error had occurred and that it was plain. *Id.* at 467-468. The Court also assumed for purposes of its decision that the error was "structural" in nature and that it affected the defendant's substantial rights. *Id.* at 468-469. But the Court

held that the error nevertheless did "not meet the final requirement of *Olano*." *Id.* at 469. The Court explained that "the evidence supporting materiality was 'overwhelming'" and that the defendant "ha[d] presented no plausible argument that the false statement under oath for which she was convicted * * * was somehow not material." *Id.* at 470. Under those circumstances, the Court held, "there [was] no basis for concluding that the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings'"; to the contrary, the Court stated that "it would be the reversal of a conviction such as this which would have that effect." *Ibid.* (second brackets in original).

The Court applied a similar analysis in *Cotton*, where an indictment omitted a fact (drug quantity) that was necessary to authorize an increase in the defendants' maximum sentence. 535 U.S. at 632. The Court accepted the government's concession of obvious error, and it assumed for purposes of its decision that the error had affected the defendants' substantial rights. *Ibid.* The Court held, however, that "the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings" and thus did not satisfy the fourth part of the *Olano* test. *Id.* at 632-633. The Court explained that "[t]he evidence that the conspiracy involved at least 50 grams of cocaine base was 'overwhelming' and 'essentially uncontroverted,'" and concluded that "[s]urely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base." *Id.* at 633 (citation omitted).

Johnson and *Cotton* make clear that reversal of a conviction based on a forfeited claim of instructional error is unwarranted, under *Olano*'s fourth prong, when

the outcome would have been the same absent the error. And in *Puckett* v. *United States*, 129 S. Ct. 1423 (2009), the Court again emphasized that, regardless of whether a defendant is able to satisfy the first three parts of the plain-error test, the fourth component—*i.e.*, whether the error seriously affects the fairness, integrity or public reputation of judicial proceedings—"is meant to be applied on a case-specific and fact-intensive basis." *Id.* at 1433; see *ibid.* (emphasizing "that a '*per se* approach to plain-error review is flawed'") (quoting *Young*, 470 U.S. at 17 n.14).

Because Rule 52(b) applies to many different types of forfeited errors, many different considerations may be relevant to an assessment of whether a forfeited error seriously affected the fairness, integrity, or public reputation of the proceedings. See *Puckett*, 129 S. Ct. at 1433. And because the fourth prong of the *Olano* test imposes an independent barrier to relief on plain-error review even when the other three prongs of the test are satisfied, see *Olano*, 507 U.S. at 737, it may require more from a defendant than simply showing an effect on substantial rights under the relatively modest "reasonable possibility" standard. Instead, a court of appeals has discretion to determine in a particular case that such an error did not seriously affect the fairness, integrity, and public reputation of judicial proceedings, because, for example, the thrust of the parties' evidence and arguments shows that the instructional error did not actually affect the outcome. See *Young*, 470 U.S. at 16 (declining to reverse, on plain-error review, when although the prosecutor's remarks were erroneous and inappropriate, they "were not such as to undermine the fairness of the trial and contribute to a miscarriage of justice"); accord *Olano*, 507 U.S. at 736-737.

In this case, the concurring judges in the court of appeals correctly reasoned that, at a minimum, reversal based on a forfeited error should not occur when "there is no reasonable possibility that [the] error * * * had an effect on the judgment." Pet. App. 14a. That standard is consistent with the recognition in *Johnson* and *Cotton* that when "overwhelming" and "essentially uncontroverted" evidence was introduced on an element that the jury was not asked to find, the verdict is so unlikely to have been different that "the error does not seriously affect the fairness, integrity, or public reputation of the judicial proceedings." *Ibid.*

B. The Forfeited Error In This Case Is Subject To Ordinary Plain-Error Principles

The court of appeals believed that it was required to grant relief on respondent's forfeited ex post facto claim so long as there was "*any* possibility, *no matter how unlikely*, that the jury could have convicted based exclusively on pre-enactment conduct." Pet. App. 10a (emphases added). It therefore proceeded directly from a finding of error to a conclusion that "a retrial [was] necessary." *Ibid.* The court of appeals' approach fails to apply the framework established in *Olano* and conflicts with this Court's decisions in *Johnson*, *Cotton*, and *Puckett*. Those decisions make clear that, even if an effect on substantial rights is established or assumed, a defendant may not obtain relief on a forfeited claim unless he can show that the error altered the outcome and therefore seriously affected the fairness, integrity, or public reputation of judicial proceedings. Such an effect is not established at least when, as in this case, no "reasonable possibility" exists that the jury could have con-

victed based solely on pre-enactment conduct. Pet. App. 14a (concurring opinion).[3]

The court of appeals did not attempt to reconcile its decision with ordinary principles of plain-error review. Instead, as the concurring judges noted, the panel followed circuit "precedent with regard to plain-error review of ex post facto violations." Pet. App. 10a. But neither Rule 52(b), nor any of this Court's cases interpreting it, provides a basis for creating a special plain-error rule applicable only to ex post facto claims.

1. As an initial matter, the error in this case may not be an ex post facto violation. The indictment charged, and the government's proof showed, a course of conduct that began before the enactment of the forced-labor statute and continued thereafter. Criminal statutes are presumed not to have retroactive effect, see *Johnson* v. *United States*, 529 U.S. 694, 701-702 (2000), and the government has not argued in this case that the TVPA criminalizes conduct that occurred before its enactment. If the TVPA does not criminalize pre-enactment conduct, it is not an "ex post facto Law" (U.S. Const. Art. I, § 9, Cl. 3). But if the jury had relied exclusively on

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[3] The court of appeals' apparent assumption that the error affected "substantial rights," even if the possibility that the jury relied exclusively on pre-enactment conduct was "remote," Pet. App. 10a, is also flawed. The omission to instruct the jury that it could not rely entirely on pre-enactment conduct is a trial error, rather than a structural error. See *Neder*, 527 U.S. at 8. Thus, when a defendant asserts a forfeited claim of error of the type at issue here (*i.e.*, the failure of the jury to make a necessary finding), he has the burden to establish some likelihood that the omission affected the outcome to satisfy the third prong of *Olano*. See pp. 11-12, *supra*. But as in *Johnson* and *Cotton*, the Court need not reach that issue because the case can be resolved on *Olano*'s fourth prong, as recognized by the concurring judges below. Pet. App. 11a (concurring opinion).

non-criminal, pre-enactment conduct to reach its verdict, then respondent was found guilty of a non-crime, which would appear to violate the Due Process Clause. See, *e.g.*, *Burge* v. *Butler*, 867 F.2d 247, 250 (5th Cir. 1989) (finding a due-process violation when a defendant was sentenced under a statute that did not apply to his crime because his conduct occurred before the statute's effective date).[4]

The proper characterization of the error in this case, however, does not affect the plain-error analysis. Under either view, the jury was given the option of finding respondent guilty on either a valid theory (a post-enactment violation) or an invalid theory (a wholly pre-enactment violation). This Court held in *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008) (per curiam), that such alternative-theory errors are susceptible to harmless-error analysis. They are susceptible to plain-error analysis as well, and

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[4] A prosecution for a course of conduct that straddles the effective date of a statute does not violate the Ex Post Facto Clause, or the Due Process Clause, "as long as at least one of the acts [constituting the offense] took place" after the statute's effective date. *United States* v. *Dixon*, 551 F.3d 578, 585 (7th Cir. 2008), cert. granted *sub nom. Carr* v. *United States*, No. 08-1301 (Sept. 30, 2009); accord *United States* v. *Brown*, 555 F.2d 407, 416-417 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); *United States* v. *Campanale*, 518 F.2d 352, 364-365 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). Thus, only if a jury relied exclusively on pre-enactment conduct would its verdict present a constitutional issue. *Dixon* applied that principle in rejecting an ex post facto challenge to a prosecution under 18 U.S.C. 2250(a), the criminal provision of the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901 *et seq.*, when one element of the violation occurred after SORNA became applicable to the defendant. This Court has granted review of that holding. This case does not involve that issue, however, because the sole question presented is the standard for plain-error review of an asserted ex post facto claim, not the determination of whether an ex post facto violation occurred.

therefore, as explained below, the court of appeals' decision to apply an "any possibility" standard here was wrong regardless of how the error is characterized.

2. This Court has made clear that all forfeited claims, no matter how serious, are subject to the same standard of plain-error review. "[T]he seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." *Johnson*, 520 U.S. at 466; see *Cotton*, 535 U.S. at 634 (plain-error review applies to the violation of the Fifth Amendment grand-jury right, which "serves a vital function" and "acts as a check on prosecutorial power"); *Puckett*, 129 S. Ct. at 1433. Indeed, in both *Johnson* and *Cotton*, this Court assumed without deciding that the error alleged was "structural" in nature—*i.e.*, that it was a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself"—and that it affected the defendants' substantial rights without any showing of prejudice under *Olano*'s third prong. *Johnson* 520 U.S. at 468 (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991)); accord *Cotton*, 535 U.S. at 632. Nonetheless, this Court applied its longstanding plain-error standard and concluded in both cases that, despite the seriousness of the errors at issue, reversal was improper under *Olano*'s fourth prong because the defendants were unable to show that the errors affected the judgment. *Johnson*, 520 U.S. at 470; *Cotton*, 535 U.S. at 633-634.

3. As the concurring judges explained below, nothing justifies a different standard of plain-error review for forfeited ex post facto claims: "While the Ex Post Facto Clause is certainly fundamental to our notions of justice, it is no more so than the Fifth and Sixth Amendment rights at issue in *Johnson* and *Cotton*." Pet. App. 13a

(citation omitted). Indeed, the error in this case is very like the error asserted in *Johnson*, because it resulted in part from the failure properly to instruct the jury. In *Johnson*, the error involved the failure of the instructions to require a finding on the element of materiality; here, it involved instructing the jury to find the elements of the offense without requiring it to distinguish between pre- and post-enactment conduct. See *id.* at 6a. Accordingly, there is no basis for adopting a different approach to plain-error review of forfeited claims such as respondent's claim in this case.

This Court "ha[s] repeatedly cautioned that '[a]ny unwarranted extension' of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice" and that "the creation of an unjustified exception to the Rule would be '[e]ven less appropriate.'" *Puckett*, 129 S. Ct. at 1429 (second and third brackets in original) (quoting *Young*, 470 U.S. at 15, and *Johnson*, 520 U.S. at 466). As this Court has observed, "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Johnson*, 520 U.S. at 470 (quoting Roger J. Traynor, *The Riddle of Harmless Error* 50 (1970)). "The real threat then to the 'fairness, integrity, and public reputation of judicial proceedings' would be if [criminal defendants], despite the overwhelming and uncontroverted evidence that they" engaged in criminal activity, were left unpunished "because of an error that was never objected to at trial." *Cotton*, 535 U.S. at 634.

Significantly, the court of appeals' decision in this case does not set forth any justification for treating forfeited ex post facto claims differently from other forfeited claims. Rather, as the concurring judges ob-

served, the court of appeals was bound by its previous decision in *United States* v. *Torres*, 901 F.2d 205 (2d Cir.), cert. denied, 498 U.S. 906 (1990), which was decided before *Olano*, *Johnson*, *Cotton*, and *Puckett*. Pet. App. 14a. In *Torres*, the Second Circuit stated that "errors of constitutional magnitude will be noticed more freely under the plain error rule than less serious errors." 901 F.2d at 228 (citation omitted). The *Torres* court, however, "did not apply [this] Court's current four-part plain-error analysis in crafting [its] standard." Pet. App. 14a (concurring opinion). It appears, therefore, that the court of appeals' decision resulted from the court's pre-*Olano* understanding of plain-error review rather than from any desire to carve out a special standard for forfeited ex post facto claims.

Nor has any other court of appeals articulated a justification for applying a special rule of plain-error review to forfeited ex post facto claims. To the contrary, since this Court decided *Olano*, other courts that have considered forfeited claims similar to respondent's have declined to grant relief in the absence of a "reasonable possibility" that the defendant could have been convicted solely on the basis of pre-enactment conduct. See *United States* v. *Paulin*, 329 Fed. Appx. 232, 234 (11th Cir. 2009) (per curiam) (unpublished decision) (denying relief under the plain-error standard because there was "no doubt that the jury would have decided the case the same way if the evidence had been limited to [the defendant's] conduct after * * * the effective date of the TVPA") (internal quotation marks and citation omitted); *United States* v. *Muñoz-Franco*, 487 F.3d 25, 57 (1st Cir.) (denying relief on plain-error review because "no reasonable jury would have convicted [the defendants] based exclusively on conduct that occurred prior to the

enactment date"), cert. denied, 128 S. Ct. 678, 128 S. Ct. 679, and 128 S. Ct. 682 (2007); *United States* v. *Tykarsky*, 446 F.3d 458, 480 (3d Cir. 2006) ("To 'affec[t] substantial rights,' the error must have been prejudicial. Tykarsky has been prejudiced if there is a reasonable possibility that a jury, properly instructed on this point, might have found Tykarsky guilty based exclusively on acts that occurred before the increased penalty took effect.") (citation omitted); *United States* v. *Julian*, 427 F.3d 471, 483 (7th Cir. 2005) (denying relief on plain-error review because "no reasonable jury would have found that [the defendant] withdrew from the conspiracy prior to" the effective date of the statute), cert. denied, 546 U.S. 1220 (2006).

C. This Court Should Remand To Allow The Court Of Appeals To Apply The Correct Standard Of Plain-Error Review

On a correct understanding of the plain-error standard, the court of appeals erred in vacating respondent's conviction simply because it identified a "possibility" that the outcome of the proceeding would have been different in the absence of the error. Pet. App. 10a. At a minimum, respondent must "offer[] a plausible explanation as to how the relevant pre- and post-enactment conduct differed, thereby demonstrating a reasonable possibility that the jury might have convicted him * * * based exclusively on pre-enactment conduct." *Id.* at 14a (concurring opinion). In the view of the concurring judges, a reasonable possibility existed that respondent would not have been convicted of sex trafficking in the absence of the error, but no such possibility existed with

respect to his forced-labor conviction. *Id. at* 15a-18a.[6] There is, however, no holding of the court of appeals on those questions. Ordinarily, this Court does not consider issues that were not passed on below, see *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and nothing in this case suggests departing from that practice. To the contrary, the court of appeals is better situated to conduct the record-specific review necessary to apply the correct standard. Accordingly, if this Court holds that this case is governed by ordinary plain-error principles rather than by the *Torres* approach, this Court should remand to allow the court of appeals to apply the correct principles in the first instance.

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[6] With respect to the forced-labor conviction, the concurring judges reached that conclusion based on their assessment that respondent's "relevant conduct was materially indistinguishable" in the pre- and post-enactment periods. Pet. App. 17a-18a. The concurring judges were correct that, if evidence of the defendant's conduct is materially the same in the periods before and after the enactment of a statute, then the defendant will not be able to establish a reasonable possibility that the jury relied exclusively on pre-enactment conduct. But that is not the only context in which a defendant will be unable to establish the requisite reasonable possibility of a different outcome. For example, the jury might have found the defendant guilty of another offense that necessarily required the defendant to have engaged in prohibited conduct after the statute's effective date, or the government might have offered "overwhelming" and "essentially uncontroverted" proof that conduct constituting one element of the offense occurred after the effective date. *Johnson*, 520 U.S. at 470.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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RESPONDENT'S BRIEF

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In The
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

GLENN MARCUS,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals properly exercised its discretion to notice a critical violation of the Ex Post Facto Clause, under the plain error doctrine of Fed. R. Crim. P. 52(b), where the relevant criminal statutes were not enacted until nearly two years *after* most of the acts charged in the indictment occurred -- *and*, the government *concedes* that the jury *could* have convicted the defendant exclusively on the conduct that took place before the statutes' enactment -- therefore there existed a *possibility* that the constitutional error affected the judgment.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Ex Post Facto Clause contained within Article I, § 9, Clause 3 of the United States Constitution provides, in pertinent part, that no "ex post facto Law shall be passed."

The Due Process Clause embodied within the Fifth Amendment to the United States Constitution provides, in relevant part, that no person shall be "deprived of life, liberty, or property, without due process of law."

Rule 52(b) of the Federal Rules of Criminal Procedure states "plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

STATEMENT OF THE CASE

The predominant question that looms so large over the landscape of this case involves a sexual relationship between two adults that the government claims was illegal. However, the statutes making their conduct unlawful were not enacted until two years after the commencement of their relationship. Thus, for a significant period there was *no federal law* prohibiting their activity.

As a consequence, the court of appeals properly found that the Respondent was entitled to a new trial because his convictions in the Eastern District of New York for Forced Labor and Sex Trafficking were obtained in violation of the Ex Post Facto Clause of the United States Constitution.

The central sequence of events that frame the salient issues goes all the way back to 1998 when the Respondent, Glenn Marcus, who was 44 years old, became involved in a prolonged intimate relationship with a 29-year-old college graduate, referred to as "Jodi."[1]

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[1] The district court directed that the government's witness be referenced solely by her first name (Pet. App. 21a).

The Conduct that Occurred Before the Enactment of the Federal Statutes

In the fall of 1998, Jodi met Glenn Marcus through a website that catered to people, like her, who were attracted to an alternative lifestyle that involved a number of unique sexual preferences, commonly known as bondage, dominance/discipline, submission/sadism, and masochism ("BDSM") (Tr.72-73, 228).

In October of 1998, Jodi flew from the Midwest to Maryland and began a sexual relationship with Glenn Marcus, which included a variety of sadomasochistic activities (Tr.76, 78, 253-54). Jodi then returned to Maryland in November for another long weekend, where they engaged in similarly intense sexual acts (Tr.77).

To facilitate this relationship, in January of 1999, Jodi moved to Maryland where she shared an apartment with another woman, Joanna, who also was attracted to the BDSM lifestyle (Tr.266, 270). The women regularly drove to New York to bring Glenn Marcus to Maryland to engage in these sadomasochistic encounters (Tr.87).

In October 1999, Jodi claims she wanted to leave Marcus after a more extreme session of BDSM (Tr.106-08, 300). But, she did not end their relationship at that time. At Christmas, she flew back to the Midwest to celebrate the holidays with her family -- as she did every year -- and then returned to Maryland to continue the sadomasochistic association with Marcus (Tr.135, 312-13).

Joanna eventually removed Jodi from their apartment because Jodi broke into Joanna's bedroom and stole some of her property (Tr.132). As a consequence, in January of 2000, Jodi moved to New York City to live, *rent-free*, with one of Glenn Marcus' friends (Tr.327-29).

While in New York, Jodi worked, from her home, on a BDSM website called "Slavespace.com" (Tr.143, 148-49, 323).[2] In addition, she continued her long-term BDSM relationship with Glenn Marcus, seeing him approximately once a week (Tr.153). All this conduct occurred *before* the enactment of the criminal statutes at issue in this prosecution.

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[2] The website only earned "several hundred" dollars each month from its advertisers and member section (Tr.153).

The Conduct that Occurred After the Enactment of the Statutes

On October 28, 2000, the Trafficking Victims Protection Act of 2000, which prohibits Sex Trafficking and Forced Labor, was enacted. Shortly after the laws went into effect, Jodi began working outside of the apartment in a corporate office, earning more than $40,000 a year (Tr.331-32). Despite commuting from Queens to Manhattan each day in her *fulltime employment*, at trial Jodi claimed that she also worked *8 to 10 additional hours each day* at home on the BDSM website (Tr.332-33).

Jodi alleged that in March of 2001, she again wanted to sever her relationship with Glenn Marcus (Tr.159). She stated Marcus would let her leave, if she allowed him to "punish" her one last time (Tr.160). Days later, she met him at a friend's house where they engaged in extreme BDSM activity (Tr.161-66).

In August of 2001, Marcus' friend asked Jodi to move out (Tr.172). Therefore, in September of 2001, Jodi moved into her own apartment, and created her own BDSM website (Tr.172, 338, 342). This ended Jodi's relationship with Glenn Marcus, as charged in the indictment.

For several more years Jodi periodically saw Marcus and engaged in consensual sadomasochistic activities (Tr.173, 176, 340). Jodi also voluntarily posed in sexually explicit photographs for the Slavespace website (Tr.350, 364, 410). Jodi concedes that she never told anybody, other than Marcus, that she was unhappy during the relationship (Tr.208, 334).[3]

The Indictment

In 2004, a dispute arose between Jodi and Glenn Marcus over the use of her photographs on their website. After Marcus refused to remove the sexually explicit photographs -- which he believed he owned -- from the website, Jodi consulted an attorney. The attorney told her to go to the FBI. After discussions with the FBI Jodi claimed, for the first time, that her conduct was not consensual (Tr.179, 352).

As a consequence, on February 9, 2007, Glenn Marcus was eventually charged in the United States District Court for the Eastern District of New York with "Sex Trafficking." The indictment alleged that, between January 1999 and October 2001, Glenn Marcus knowingly and intentionally caused Jodi to "engage in a commercial sex act" -- referring to the photographs posted on their

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[3] Jodi continued to socialize with Glenn Marcus. She went on camping trips with him, together with his adult daughter, and son-in-law, who is a former prosecutor (Tr.340, 363, PSR ¶59). She also invited Marcus' daughter to her home for a "family" dinner (Tr 634-35).

website -- through force, fraud and coercion, in violation of 18 U.S.C. § 1591.[4] (A.26-27).

Marcus was also charged with "Forced Labor" because Jodi claimed that during the same time period she worked on the website, under threat of serious harm and physical restraint, in violation of 18 U.S.C. § 1589.[5] (A.27).

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[4] 18 U.S.C. § 1591(a), the Sex Trafficking statute, provides that,

> Whoever knowingly ... in or affecting interstate or foreign commerce ... recruits, entices, harbors, transports, provides, or obtains by any means a person ... knowing that force, fraud, or coercion ... will be used to cause the person to engage in a commercial sex act [shall be guilty of a crime]

[5] 18 U.S.C. § 1589, entitled "Forced Labor," states, in pertinent part, that

> Whoever knowingly obtains the labor or services of another person ... by threats of serious harm to, or physical restraint against, that person or another person [shall be guilty of a crime].

The Jury Deliberated for Seven Days

The trial commenced on February 12, 2007. The prosecution relied primarily on Jodi's testimony, which included conduct that preceded the enactment of the statutes by more than two years. The prosecution then called Agent Austin Berglas, who testified that Jodi sought the FBI's assistance in taking down some photographs of her that were posted on a specific website -- *not* because she was the victim of any Forced Labor or Sex Trafficking (Tr.421). The defense called Glenn Marcus' daughter, as well as Jodi's roommate in New York, and two experts relating to BDSM.

The jury *deliberated for seven days* before eventually finding Glenn Marcus guilty of both the Sex Trafficking and Forced Labor charges (A.378).[6] The district court then sentenced Marcus, who has no prior criminal history, to a non-guideline sentence of *nine years imprisonment* (A.379-80).[7]

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[6] Glenn Marcus was found *not guilty* of a third count, which charged him with transmitting "obscene" pictures on the Slavespace website, in violation of 18 U.S.C. § 1462 (A.27-28).

[7] The Respondent was remanded after sentence was imposed. He remained incarcerated at FCI Fort Dix for 16 months, until January 7, 2009, when, pursuant to a stipulation that was so-ordered by the court of appeals, Glenn Marcus was released on bail secured by his parents' home. He is currently on home confinement and subject to electronic monitoring.

The Court of Appeals Found that this Case "Clearly Implicates the Ex Post Facto Clause"

On appeal, Glenn Marcus engaged new counsel who argued, for the first time, that the convictions violated the Ex Post Facto Clause because the Sex Trafficking and Forced Labor statutes were not enacted until *two years after* Jodi and Marcus began their unorthodox sexual relationship.

The Second Circuit agreed that the case implicated the Ex Post Facto Clause and stressed that the undisputed facts showed (1) the indictment charged Marcus with violating the statutes before they were even enacted; (2) the government presented evidence at trial of conduct that occurred *before* the statutes' enactment; (3) and the district court never instructed the jurors not to consider the proof of conduct that occurred before the enactment of the laws in question (Pet. App. 7a). Most significantly, the government also conceded in the circuit court that the jury could have found Glenn Marcus guilty based solely on conduct that occurred *before* the laws were enacted (Pet. App. 9a).

The court of appeals, exercising its discretion under Rule 52(b), vacated both convictions because they violated the Ex Post Facto Clause and remanded the case for a new trial. Thereafter, it denied the government's petition for rehearing (Pet. App. 9a, 65a).

SUMMARY OF THE ARGUMENT

The court of appeals properly invoked its discretion, under Fed. R. Crim. P. 52(b), by granting a new trial in the face of a constitutional violation of the Ex Post Facto Clause that, although not raised at trial, *could* have affected the jury's verdict since, as the government concedes, the jury could have found Marcus guilty under both statutes "solely" for conduct that occurred before their enactment (Pet. App. 7a-9a).

Rule 52(b) endows circuit courts with the authority to consider a plain error, which affects defendants' substantial rights, even though it was not brought to the lower court's attention. And, the decision to correct an unpreserved error lies "within the sound discretion of the court of appeals." *United States v. Olano*, 507 U.S. 725, 732 (1993). The exercise of that discretion may be warranted when there is (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) that seriously affects the fairness, integrity or public reputation of judicial proceedings. *Id.* at 732, 736.

Here, there is no dispute about this standard, which was properly applied by the Second Circuit (Pet. App. 6a). Nevertheless, the government urges that the court of appeals "departed from" the principles enunciated in *Olano* by granting a new trial for an ex post facto violation without showing that the error seriously affected the fairness, integrity or public reputation of the proceeding (Pet. Br. 8).

Glenn Marcus was convicted of violating two federal statutes over a period of nearly three years. However, neither criminal statute was even enacted until almost two years after the time charged in the indictment!

As a consequence, it is difficult to imagine an error that is more plain or of greater amplitude -- and so worthy of review under Rule 52(b) -- than indicting, trying, convicting and sentencing a defendant for conduct which, when committed, was not a crime.

The government essentially concedes that Glenn Marcus is entitled to a new trial on his conviction for Sex Trafficking because of the ex post facto violation (Pet. Br. 8-9).[8] Nonetheless, it urges that his conviction for Forced Labor should be reinstated, and he should suffer the brutality of a nine-year sentence of imprisonment, because it was merely possible -- not probable -- that the jurors relied exclusively on pre-enactment conduct (Pet. Br. 9, 12, 16).

Therefore, the prosecution maintains that before a circuit court can notice an ex post facto error, under the plain error doctrine, it must be "reasonably possible" that the conviction was based entirely on conduct that preceded the criminal statute's enactment.

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[8] The concurring judges from the Second Circuit noted that "Marcus' relevant conduct differed materially before and after October 2000, such that there is a reasonably possibility that the jury may have convicted him [of Sex Trafficking] based exclusively on pre-enactment conduct" (Pet. App. 15a-16a).

However, a conviction that was possibly based on a violation of the Ex Post Facto Clause seriously affects the fairness, integrity and public reputation of the judicial proceedings. The venerable maxim *nulla peona sine lege*, which dates back in time to the ancient Greeks, provides that there shall be no punishment without a law authorizing it. In fact, this fundamental principle has been described as "one of the most 'widely held value-judgment[s] in the entire history of human thought.'"[9]

That great safeguard against constitutional infringements is rendered impotent if a circuit court is stripped of its power to grant a new trial where, as here, the government *concedes* that the defendant *could* have been convicted of conduct that was not unlawful at the time of its occurrence.

Moreover, there is simply no need or basis for imposing national restrictions on how circuit judges may exercise their discretion. Courts of appeals have always been allowed broad discretion in how they supervise litigation within their own circuit. Thus, even if some courts may differ slightly in their review of ex post facto claims for plain error, an ironclad rule of restriction is not required for this procedural issue.

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[9] *Rogers v. Tennessee*, 532 U.S. 451, 467-68 (2001) (Scalia, J., dissenting), quoting J. Hall, *General Principles of Criminal Law* 59 (2d ed. 1960).

But, even if a uniform rule were necessary, then a constitutional violation of this stature -- involving the *conviction of a person for conduct that is not barred by any law* -- certainly should fall well within that "special category of forfeited errors that can be corrected regardless of their effect on the outcome" of the case, as contemplated by the Court in *Olano*. 507 U.S. at 735.[10]

Therefore, where conduct spans a time period -- part of which occurred *before* a statute was enacted and part of which occurred *after* its enactment -- and the government concedes that the defendant *could* have been convicted exclusively on pre-enactment conduct -- the most reasonable and just approach is to grant a new trial to ensure a sense of certainty that a person can only be convicted for acts that actually violate the law.

In addition, this constitutional error was "structural" in nature and certainly rose far above the level of a mere "instructional" error. A grand jury returned an indictment charging conduct that was not criminal. Thus, the indictment itself is fatally flawed because it accuses the defendant of acts that were not unlawful.

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[10] In *Calder v. Bull*, 3 Dall. 386, 390 (1798), Justice Chase famously identified four types of laws to which the Ex Post Facto Clause extends. The very first category covers our case and involves "[e]very law that makes an action done before the passing of the law, and which was innocent when done, criminal."

The defendant was then tried for conduct that violated no law. The trial was overwhelmed by evidence of acts that were not illegal. The jurors ultimately convicted the defendant of conduct that violated no statute. And, he was then sentenced to imprisonment for nine years for behavior during a time period for which there was no law. Finally, *there was no jurisdiction in the federal court to try a defendant on conduct that violated no federal law*!

One of the most cherished policies of our nation has always been an abiding belief that a government of a strong and free people does not need the conviction of Glenn Marcus, which was obtained through the most oppressive of all the tools of tyranny -- an ex post facto law. As a consequence, the Court should affirm the judgment of the court of appeals.

ARGUMENT

AN APPELLATE COURT HAS THE DISCRETION TO NOTICE A CONSTITUTIONAL VIOLATION OF THE EX POST FACTO CLAUSE WHERE IT IS POSSIBLE THE ERROR AFFECTED THE JUDGMENT

An abhorrence of ex post facto laws is ranked as one of the most fundamental principles of constitutional law. The heritage of this critical provision is deeply rooted in the need to protect individuals against arbitrary, vindictive and oppressive government.[11] This is because the "creation of crimes after the commission of the fact," or the "subjecting of men to punishment for things which, when they were done, [violated] no law," have always been the "favorite and most formidable instruments of tyranny."[12]

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[11] The exalted status of the Ex Post Facto Clause is evidenced by the fact that the Framers not only barred the federal government from enacting retroactive legislation, but also found it sufficiently serious to bar the *states* from passing such laws. *See* U.S. Const. art. I, § 9 (barring the passage of federal ex post facto laws), U.S. Const. art. I, § 10 (prohibiting states from enacting ex post facto laws).

[12] The Federalist No. 84, p. 511 (Alexander Hamilton) (C. Rossiter ed. 1961).

The Ex Post Facto Clause, more than any other constitutional provision, guarantees the fairness and legitimacy of the judicial process. Alexander Hamilton described the proscription against ex post facto laws as one of the three "great[est] securities to liberty" contained in the Constitution.[13] And, James Madison emphasized that ex post facto laws are "contrary to the first principles of the social compact, and to every principle of sound legislation."[14] As such, the Ex Post Facto Clause stands as a "majestic bulwark in the framework of our Constitution."[15]

Through this provision, and the Due Process Clause, the Framers sought to make certain that all people have fair warning of conduct that is proscribed by law. As a consequence, this Court has consistently denounced statutes that subject individuals to punishment in direct defiance of the Ex Post Facto Clause.[16]

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[13] *Id.* Hamilton also included the establishment of the ancient writ of habeas corpus and the prohibition of titles of nobility among those securities of liberty.

[14] The Federalist No. 44, p. 282 (James Madison)(C. Rossiter ed. 1961).

[15] *Dobbert v. Florida*, 432 U.S. 282, 311 (1977) (Stevens, J., dissenting).

[16] *See, e.g., Stogner v. California*, 539 U.S. 607 (2003) (state law which permitted prosecution for sex-related child abuse within one year of the victim's report to the police -- even though the offenses were time-barred -- was unconstitutional); *Carmell v. Texas*, 529 U.S. 513 (2000) (an amendment of a statute authorizing convictions for certain sexual offenses based solely on the victim's testimony, where

However, not all ex post facto violations are detected during the trial proceedings. Even though they lurk on the record, as exemplified by this case, occasionally the judge, prosecutor and defense counsel overlook them. Instead, they may be identified for the first time on appeal, when appellate counsel conducts a more meticulous review of the statute's history and the defendant's conduct. It is this type of natural oversight that Rule 52(b) was enacted to remedy.[17]

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previously corroborating evidence had been required, violates the Ex Post Facto Clause); *Miller v. Florida*, 482 U.S. 423 (1987) (application of revised sentencing guidelines to crimes that occurred before the effective date of the revision violated the Ex Post Facto Clause); *Weaver v. Graham*, 450 U.S. 24 (1981) (statute that reduced the amount of good time which could be earned by prisoners violated the Ex Post Facto Clause when applied to defendants whose crime occurred before its effective date); *Rabe v. Washington*, 405 U.S. 313 (1972) (conviction based on an unforeseeable judicial construction of a state obscenity law violated the Ex Post Facto Clause). This list is illustrative only.

[17] Rule 52(b) specifically provides that, on appeal, a "plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

In *United States v. Olano*, 507 U.S. 725, 732 (1993), this Court formulated the standards necessary to qualify for the benefits of plain error review: a defendant must establish (1) error (2) that is plain and (3) which affects substantial rights. Moreover, whether to review an unpreserved issue for plain error resides in the *sound discretion* of the circuit court. *Olano*, 507 U.S. at 732. But, such discretion is only appropriate if the error (4) "seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* at 736. Here, we urge, it certainly did.

A Conviction that Could be Based on a Violation of the Ex Post Facto Clause Seriously Affects Substantial Rights as well as the Fairness, Integrity and Public Reputation of the Judicial Proceedings

The main debate that encircles this conviction focuses on the fourth *Olano* factor, which addresses the impact of a plain error.[18] Significantly, the fairness, integrity and reputation of judicial proceedings are seriously undermined by ex post facto violations for the following five constitutional reasons:

First, at trial a defendant is overcome by testimony and exhibits relating to conduct that occurred *before* the law was enacted. Therefore, without the ex post facto protections, massive amounts of highly volatile, prejudicial and cumulative evidence infects every aspect of the trial. This certainly implicates the fairness of the judicial proceedings as well as the defendant's substantial rights.

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[18] The government notes that the "sole question presented is the standard for plain-error review of an asserted ex post facto claim, not the determination of whether an ex post facto violation occurred" (Pet. Br. 17 n.4). Furthermore, the government acknowledges that "the case can be resolved on *Olano*'s fourth prong" (Pet. Br. 16 n.3).

Second, a jury's verdict is bound by the crime as alleged in the indictment. Thus, where the indictment expressly charges the defendant with criminal conduct during a *period of time for which, as a matter of law, there could be no offense*, the *entire indictment* is radically flawed.

Third, there is absolutely no way of knowing what conduct formed the basis for the jury's determination. If a defendant could have been convicted of conduct that violates no law, the integrity of the judicial system is seriously undermined.

Fourth, the public is entitled to advance notice of what conduct is to be avoided. However, the public's confidence is shattered by a judicial system that allows individuals to be tried for crimes for which there was no notice or warning.

Finally, the federal courts have *no jurisdiction* to prosecute an individual for behavior that, at the time it was undertaken, violated no federal law. After all, it is well established that there is no jurisdiction in federal court to try criminal charges based on common law and *all federal crimes must be based on a statute enacted by Congress.*[19]

All of these factors and considerations apply to Glenn Marcus' convictions for Forced Labor and Sex Trafficking, which included nearly two years of conduct that preceded the existence of any federal statute!

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[19] *See, e.g., United States v. Hudson*, 7 Cranch 32 (1812).

A violation of the constitutional Ex Post Facto Clause -- which could have resulted in the defendant's conviction for conduct that was not made illegal by a specific law -- is neither minor nor inconsequential. As a consequence, a prosecution contaminated by ex post facto violations does, in every respect, affect substantial rights and seriously undermine the integrity of the judicial proceeding.

The Court of Appeals Correctly Granted a Retrial to a Defendant Whose Conviction, Concededly, Could Have Resulted from an Ex Post Facto Violation

The Second Circuit granted a retrial because the jurors *could* have relied exclusively on pre-enactment conduct when they convicted Glenn Marcus. Since a criminal conviction can expose individuals to the cruel reality of prison, including a life sentence, or even the death penalty, the rationale underlying the court of appeals' approach to plain error is manifestly simple and fair: a defendant should not be subjected to a criminal conviction if it is *possible* that the jurors, who deliberated his fate, made their decision exclusively on conduct that occurred when there was no law rendering that conduct criminal.

Nevertheless, the government argues that the circuit court's discretion should be limited to those instances where there is a "*reasonable possibility*" that the jurors relied solely on conduct occurring before the statute's enactment. However, the burden of "reasonable possibility" is virtually insurmountable for defendants because there is no mechanism to discover what evidence the jurors relied upon in reaching their verdict.

In sharp contrast, the "possibility" test, adopted by the Second Circuit, is an *objective standard*, which does not require the circuit judges to be clairvoyant or attempt to enter the jurors' minds.

The Court of Appeals' Decision Comports With this Court's Standards

The government suggests that the Second Circuit deviated from the standards established by this Court in *Olano* and its descendents. In particular, the government argues that a defendant may not obtain relief on a "forfeited claim" which is "instructional" in nature when "the outcome *would have been the same* absent the error" (Pet. Br. 13-14) (emphasis supplied).

However, the court of appeals, which appropriately construed the *Olano* test (Pet. App. 6a), did *not* depart from this Court's standards. Instead, it acknowledged that Marcus' case "clearly implicates the Ex Post Facto Clause" (Pet. App. 7a). This is particularly true where the government *concedes* that the outcome *could* have been different (Pet. App. 8a-9a).

The cases cited by the government are readily distinguishable and do not involve constitutional issues of the magnitude presented by this unique ex post facto violation.

For example, in *Olano* alternate jurors, who should have been discharged when the jury retired to consider its verdict, were allowed in the jury room during deliberations in violation of a statute.[20] The Court found that there was no occasion to notice the plain error because the presence of alternates in the jury room did not affect substantial rights, especially since they were specifically instructed not to participate in deliberations. 507 U.S. at 737.

In striking contrast, in Marcus' case the Second Circuit addressed a *constitutional* issue of considerable scale and consequence. Moreover, the bulk of the evidence received against Marcus related to a *two-year period* before the criminal statutes were even enacted! Certainly, this enormous volume of vivid and graphic proof had a much more acute impact on the jurors than the silent, and carefully instructed, alternates in *Olano*.

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[20] Fed. R. Crim. P. 24(c) provides, in relevant part, that "the court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew."

In *Johnson v. United States*, 520 U.S. 461 (1997), relied upon by the government, the defendant was charged with knowingly making a false material declaration under oath before a grand jury. At trial, the judge instructed the jurors that materiality was a question of law for him to decide. Therefore, the judge, *rather than the jurors,* determined that the defendant's statements were material. However, prior to the defendant's appeal, the law changed drastically, making materiality a question for the jury, not the judge, to resolve.

This Court found that the fourth prong of the *Olano* test, needing to justify plain error analysis, was *not* satisfied in *Johnson* where the evidence supporting the "materiality" element of the perjury conviction was *"overwhelming"* and *"essentially uncontroverted"* at trial. 520 U.S. at 469-70 (emphasis supplied). No "miscarriage of justice" would have resulted from not correcting the error since there was *no* possibility that the outcome of the trial would be affected by the error.

Similarly, in *United States v. Cotton*, 535 U.S. 625 (2002), the defendant was not prejudiced by the indictment's failure to allege the quantity of drugs involved in the conspiracy, since the evidence at trial concerning that missing element, was "essentially uncontroverted," as well as "overwhelming." 535 U.S. at 633.

Here, unlike *Johnson* and *Cotton*, the government *concedes* that the error *could* have affected the outcome of the trial. In fact, Marcus' trial was flooded with *two full years of highly volatile evidence relating to sadomasochistic and related conduct before the statutes*, forbidding such conduct, *were even enacted*. Moreover, the proof relating to the post-enactment behavior only consisted of 11 months!

The government's reliance on *United States v. Paulin*, 329 Fed. Appx. 232 (11th Cir. 2009) (per curiam and unpublished), is also misplaced. There, the indictment clearly specified that the defendant was only charged for her conduct *after* the enactment of the Trafficking Victims Protection Act.[21] Although other offenses in the *Paulin* indictment dated back to 1999, the prosecution was careful to limit the commencement of the Forced Labor count to October 29, 2000 -- the very day after that criminal statute became effective![22] In stark contrast, the indictment returned against Glenn Marcus charged misconduct that covered a period of nearly two years *before* the statute was enacted!

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[21] 329 Fed. Appx. at 234.

[22] *See* Paulin Indictment at 4, *United States v. Maude Paulin*, Docket No. 07-Cr-20263 (S.D.Fl.)

And, in *Paulin*, there also was "no doubt" that the jurors would have decided the case the same way if the pre-enactment evidence had been excluded.[23] Here, it bears repeating, the government admits that the jurors could have convicted Marcus exclusively on his conduct before the Forced Labor statute was enacted.

Constitutional Ex Post Facto Violations Are Entitled to be Noticed More Freely than Less Serious Errors

In *Olano*, the Court emphasized that *prejudice may be presumed* for certain brands of egregious plain error. 507 U.S. at 735. In light of the high ranking of the Ex Post Facto Clause, we urge that this critical form of constitutional violation falls within the special category of flagrant errors that should be corrected regardless of their effect on the outcome. Thus, the potency of this error, which is of a constitutional proportion, should be presumed to be prejudicial especially because of the difficulty encountered by a defendant in being able to show he has suffered harm.

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[23] *Id.* Similarly, in *United States v. Munoz-Franco*, 487 F.3d 25, 57 (1st Cir.), cert. denied, 552 U.S. 1042 (2007), the court saw "nothing to differentiate [the defendants'] pre-enactment conduct from subsequent conduct."

The government tries to blunt the sharpness of this acute constitutional violation by trying to label it an "instructional" error (Pet. Br. 8, 12). However, a prosecution that breaches the ex post facto law -- and allows an individual to be indicted for *conduct that was not unlawful* when it was performed -- certainly raises the gravest constitutional concerns, and seriously affects the fairness, integrity and public reputation of the judicial process, as well as the entire structure of the trial itself.

Such a violation of the Ex Post Facto Clause is a "structural" error because it affects the "framework within which the trial proceeds, rather than simply an error in the trial process itself." *Johnson*, 520 U.S. at 468. It fits squarely within the types of errors that have qualified as structural by this Court. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275 (1993) (erroneous reasonable-doubt instruction to jury); *Waller v. Georgia*, 467 U.S. 39 (1984) (the right to a public trial).

Certainly, an error that involves prosecuting a person for conduct that does not violate any law is, in every respect, as serious and fundamental as those cases in which the Court concluded the error was structural. Nothing could be more devastating.

Here, the constitutional violation grievously affected Glenn Marcus' substantial rights, as well as the fairness of the judicial proceedings. He was indicted for conduct that violated no law. Then two years of torrential proof poured through the opening created by the ex post facto violation.

Thus, significant public policy concerns arise in the face of the government's disturbing suggestion that fundamental, constitutional errors -- even those that affect the framework within which the trial proceeds -- should not be entertained under the mantle of plain error.[24]

Where a defendant has been charged with conduct that occurred before the enactment of a federal statute -- and the government concedes that he could have been convicted based exclusively on his pre-enactment conduct -- such a constitutional violation of the Ex Post Facto Clause falls within the special category of forfeited errors that can be corrected regardless of their effect on the outcome of the trial. Furthermore, such an error should be presumed prejudicial if the defendant cannot make a specific showing of prejudice.

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[24] In *Puckett v. United States*, 129 S. Ct. 1423, 1428 (2009), cited by the government, the Court only addressed whether Rule 52(b)'s plain error test applies to unpreserved claims where the government failed to fulfill its obligations under a plea agreement. There, the Court concluded that Rule 52(b) does, indeed, apply to unpreserved breach of contract claims. *Id.* The Court determined that since a breach of a plea deal is not a structural error, such a claim is subject to harmless error review and prejudice must be shown. *Id. at 1432.*

The Third Circuit Has Applied the Second Circuit's Standard

Other circuits have endorsed the Second Circuit's objective approach, which accords circuit judges the discretion to vacate a conviction where, but for the ex post facto violation, the outcome *could* have been different. For example, in *United States v. Tykarsky*, 446 F.3d 458, 481 (3rd Cir. 2006), cert. denied, 129 S. Ct. 1929 (2009), the Third Circuit reversed the defendant's conviction where there was a "*possibility* that a reasonable jury could have convicted Tykarsky based solely" on his pre-enactment conduct (emphasis supplied).

The Third Circuit continued that the "most that can be said here is that it is *improbable*, rather than *impossible*, as a factual matter, that the jury convicted Tykarsky exclusively" on his pre-enactment acts. 446 F.3d at 482 (emphasis modified). That, however, was sufficient to persuade the court that the defendant's substantial rights were affected. As a consequence, the Third Circuit found plain error and vacated the defendant's sentence even though the bulk of the conduct occurred after the statute was enacted.

The court in *Tykarsky* used the word "reasonable" to modify the term "jury" rather than the term "possibility." 446 F.3d at 481. Therefore, the relevant consideration related to the reasonableness of the *jurors*, not the possible effect on the outcome. Courts presume that "reasonable jurors" are properly instructed and will fairly consider all of the evidence. *Schlup v. Delo*, 513 U.S. 298, 329 (1995). Thus, a reviewing court should consider whether it was *possible* that reasonable jurors, properly instructed, would have convicted the defendant based exclusively on pre-enactment conduct.[25]

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[25] The Third Circuit noted that a defendant "has been prejudiced if there is a reasonable possibility that a jury, properly instructed on this point, might have found [the defendant] guilty based exclusively on acts that occurred before the increased penalty." *Tykarsky*, 446 F.3d at 481-82. However, as noted by the concurring judges of the Second Circuit, "the Third Circuit has applied our standard ... examining whether there is *any possibility* that the jury could have convicted the defendant based exclusively on pre-enactment conduct" (Pet. App. 15a) (emphasis supplied).

Prejudice is Presumed Where There is "Any Possibility" of a Different Outcome

Even where the consequences are less severe than an ex post facto violation, several circuits have found that prejudice should be presumed if there is "*any possibility*" of a different outcome. For example, the Seventh Circuit holds that where a defendant's right to allocute was violated, a reviewing court "should presume prejudice when there is any *possibility* that the defendant would have received a lesser sentence had the district court heard from [her] before imposing sentence."[26] The Eleventh Circuit also applies the "possibility" of prejudice standard for plain error review where a defendant was not given an opportunity to allocute.[27]

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[26] *United States v. Pitre*, 504 F.3d 657, 662 (7th Cir. 2007) (emphasis supplied), quoting *United States v. Luepke*, 495 F.3d 443, 451 (7th Cir. 2007) (noting the division among the circuits on whether a court of appeals ought to presume prejudice when a violation of the right to allocution is established); *see also United States v. Adams*, 252 F.3d 276, 288 (3rd Cir. 2001) (presuming prejudice where the defendant's right of allocution was violated).

[27] *See, e.g., United States v. Carruth*, 528 F.3d 845, 847 n. 4 (11th Cir. 2008).

The courts adopt this approach to accommodate the "*immense practical difficulty facing a defendant who otherwise would have to attempt to prove that a violation affected a specific sentence.*"[28] Thus, "[t]hat the right to allocution, properly afforded, *could* have had such influence is the most we reasonably can expect a defendant to demonstrate."[29]

The same rationale supports the need for courts of appeals to have the discretion to grant a new trial where there is any possibility that an ex post facto violation influenced the jury's verdict. This is, of course, because it is impossible for defendants to know what evidence influenced the verdict.

Cases like *Adams, Carruth, Luepke* and *Pitre* add enormous force to our claim since, unlike an ex post facto violation, which is deeply rooted in the very heart of the Constitution, a defendant's right to allocute has no constitutional foundation. All the imperatives for greater discretion are even more evident when the Ex Post Facto Clause is breached.

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[28] *Luepke*, 495 F.3d at 451 (emphasis supplied).

[29] *Id.* (emphasis in original).

A National Approach is Not Required

In addition, courts of appeals are allowed broad territorial discretion in how they supervise litigation within their circuits. Thus, even if some courts may differ slightly in their review of plain error claims, reconsideration of the Second Circuit's approach is not warranted because a uniform national rule is not required for this procedural issue.

The choice of which procedural approach to adopt does not require a uniform national solution. For example, in *Ortega-Rodriguez v. United States*, 507 U.S. 234, 251 n.24 (1993), this Court recognized that uniformity among the circuits is not necessary in their approach to fugitive dismissal rules. The Court also noted "so long as all circuit rules meet the threshold reasonableness requirement ... they may vary considerably in their operation."

As a consequence, the Court declined to require a uniform rule for the determination as to when pre-appeal flight would warrant dismissal of an appeal. Instead, the Court left that question to the discretion of the "various courts of appeals." *Id.* The circuit courts should not be further constrained in their discretion to review constitutional errors for plain error.

The Relevant Pre-Enactment and Post-Enactment Conduct Was Markedly Different in the Current Case

Finally, the Second Circuit granted a retrial because, as conceded by the government, Glenn Marcus could have been convicted of Sex Trafficking and Forced Labor for acts that occurred before those statutes were ever enacted.[30]

Here, there were significant differences between the pre-enactment and post-enactment evidence. For example, Jodi claimed that she *created* the website called Slavespace.com *before* the Forced Labor statute was enacted at the end of October 2000 (Tr.134, 143). The creation of a website obviously involved considerable effort. In marked contrast, she testified that she merely uploaded photographs and clicked on certain links during the period after the statute was in effect (Tr.148-49).

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[30] Glenn Marcus has, throughout these proceedings, always maintained his innocence because of the consensual nature of the long-term relationship. Therefore, it is difficult for defense counsel to speculate whether the jurors relied on evidence elicited at trial occurring before or after the enactment of the Trafficking Victims Protection Act. Nevertheless, without waiving any of Marcus' arguments relating to the insufficient evidence, for purposes of the Court's evaluation under the Ex Post Facto Clause, it was certainly possible for the jury to base its Sex Trafficking *and* Forced Labor verdicts *solely on pre-enactment conduct*.

In addition, the record established that days *after* the Forced Labor statute went into effect *Jodi began a full-time job in an office* outside of the apartment (Tr.331-33). Therefore, there is both a possibility *and* a reasonable possibility that the jurors only credited Jodi's claim of working 8 to 10 hours a day on the website *before* the law became effective (Tr.333).

Finally, the *pre-enactment period of conduct charged in the indictment was nearly twice as long as the post-enactment phase*! A substantial number of exhibits were introduced at trial that related solely to the pre-enactment period -- and considerable testimony was devoted to this period as well. Thus, under any approach adopted for review -- such as the Fifth Circuit, which considers when the majority of the acts charged in the offense occurred[31] -- Glenn Marcus certainly would be entitled to a new trial under those quantitative standards.[32]

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[31] *See, e.g., United States v. Todd*, 735 F.2d 146, 150 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985).

[32] The Solicitor General appears only to contest the Second Circuit's grant of a new trial for the *Forced Labor* conviction (Pet. Br. 8-9). Therefore, the government is apparently in agreement with the circuit court that, regardless of what happens to the Force Labor conviction, Glenn Marcus is still entitled to a new trial on the Sex Trafficking count. In that circumstance, because of the nature of the interlocking proof and influence the evidence of one charge would have on the other, a retrial is warranted on both counts.

In sum, here, there was an error, that was plain, which affected Glenn Marcus's substantial rights. The constitutional violation also seriously affected the fairness, integrity and public reputation of the judicial proceedings. Therefore, there is no reason to disturb the decision of the court of appeals. Certainly, a miscarriage of justice would result if defendants could be subjected to criminal convictions under these facts.

No system of criminal justice can survive if its effectiveness comes to depend on its citizens' abdication, through unawareness, of their constitutional rights. This is why the doctrine of plain error achieves paramount importance. It protects citizens against the terrible consequences of such unconscious defaults.

We know from experience that illegitimate and unconstitutional practices get their first footings by silent approaches and slight deviations from established legal modes and procedures. The main means of correcting these incursions into our great established rights is by a just construction of the plain error doctrine embodied in Rule 52(b). If we were ever to confine the circuit courts' discretion so that they could not correct constitutional errors of this magnitude, this would inevitably lead to a gradual depreciation of these cherished rights. And, if that were to happen, we would all be the losers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

January 19, 2010

Respectfully submitted,

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REPLY BRIEF

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No. 08-1341

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GLENN MARCUS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Respondent contends that the mere possibility that his conviction was based on an ex post facto violation affected his "substantial rights" and seriously impaired the "fairness, integrity and reputation of judicial proceedings" (Br. 19); apparently as an alternative argument, he also asserts that ex post facto violations should be noticed "[m]ore freely" than other presumably less serious errors (Br. 27). Neither respondent's attempt to satisfy this Court's plain-error standards nor his request for a relaxed application of them has merit. Federal Rule of Criminal Procedure 52(b) provides courts of appeals with a limited authority to correct errors that were forfeited because they were not raised in the district court. Under Rule 52(b), a reviewing court may not reverse unless the defendant carries the burden to show a plain error affecting substantial rights; even then, the court may not notice the forfeited error unless it seri-

ously affected the fairness, integrity, or public reputation of the proceeding. The defendant normally cannot meet that burden when there is no reasonable possibility that, but for the error, the outcome of the proceeding would have been different.

As explained in the opening brief, the court of appeals departed from those principles by holding that, whenever a defendant asserts a forfeited claim based on the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, reversal is required if there is "any possibility, no matter how unlikely, that the jury could have convicted based exclusively on" conduct that pre-dated the enactment of the statute, Pet. App. 10a. The court offered no reason why ex post facto claims should be treated differently from other kinds of claims. Respondent now attempts to do so, but his efforts are unavailing because this Court has made clear that all forfeited claims, no matter how serious, are subject to the same standard of plain-error review.

In this case, respondent was charged with forced labor and sex trafficking based on a course of conduct that took place both before and after the enactment of those statutes. As long as the jury did not rely exclusively on pre-enactment conduct in convicting respondent, his conviction is constitutionally valid. And the concurring judges in the court of appeals correctly concluded that there is no reasonable possibility that the jury relied exclusively on pre-enactment conduct in convicting respondent on the forced-labor count because his pre-enactment and post-enactment conduct were materially indistinguishable. For that reason, the failure of the jury instructions to address this issue did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Respondent attempts to demonstrate that his pre-enactment conduct was different from his post-enactment conduct. His argument is unpersuasive. But more importantly, because the court of appeals did not reach that question, there is no reason for this Court to resolve that record-intensive issue in the first instance. Instead, this Court should reverse the judgment below and remand to allow the court of appeals to apply the correct plain-error standard to this case.

A. Rule 52(b) Precludes A Court Of Appeals From Noticing A Forfeited Error Unless There Is A Reasonable Possibility That It Affected The Outcome Of The Proceeding

1. Rule 52(b) states that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). In *United States* v. *Olano*, 507 U.S. 725 (1993), this Court held that, "before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997) (brackets in original) (quoting *Olano*, 507 U.S. at 732). When all three requirements are satisfied, "the court of appeals has authority to order correction, but [it] is not required to do so." *Olano*, 507 U.S. at 735. Instead, a reviewing court "may * * * exercise its discretion to notice a forfeited error" only if a fourth condition is satisfied: "the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson*, 520 U.S. at 467 (brackets in original) (citation omitted). As the concurring judges below explained, that fourth requirement cannot be satisfied when there is no reasonable possibility that the error had some effect on the outcome. Pet. App. 14a. And the

government's opening brief demonstrated that this approach is required by this Court's cases. Gov't Br. 12-15.

2. Respondent attempts (Br. 23-27) to reconcile the decision of the court of appeals with this Court's decisions construing Rule 52(b), but his efforts are unavailing. The court below rejected a reasonable-possibility standard, holding instead that "a retrial is necessary whenever there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct." Pet. App. 10a. The concurring judges understood the court's test the same way, explaining that the decision "requires a retrial whenever there is *any* possibility that an improperly instructed jury could have convicted a defendant based exclusively on conduct committed prior to the enactment of the relevant statute." *Id.* at 11a. But respondent cites no authority for the proposition that a defendant asserting a forfeited claim of error may prevail by showing a mere theoretical possibility—rather than a reasonable possibility—that the error affected the outcome. Such an approach would undermine Rule 52(b)'s basic purpose of "reduc[ing] wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 82 (2004).

Respondent objects (Br. 20) to a reasonable-possibility standard on the ground that there is "no way of knowing what conduct formed the basis for the jury's determination." That criticism would bar any effort to assess prejudice, in this or any other context. A court conducting harmless-error analysis when the jury instructions do not cover an element of the offense must conduct a similar inquiry to ascertain whether, on the

record, a rational jury would have reached the same verdict absent the error. See *Neder* v. *United States*, 527 U.S. 1, 17-20 (1999). Such a review does not entail speculation but simply analysis of the record "in typical appellate-court fashion." *Id.* at 19. Of course, courts may encounter cases in which it is difficult to determine the basis for the jury's decision. If there is genuine uncertainty whether the jury's verdict was based on entirely pre-enactment conduct, then the defendant will have carried the burden of showing prejudice and will be entitled to relief. But in other cases—including this one—the evidence will be such that, as the concurring judges on the court of appeals put it, the defendant "has no plausible argument as to why the jury would have differentiated between his conduct before and after the enactment of the statute." Pet. App. 17a.

Relatedly, respondent contends (Br. 22) that a "possibility" test is preferable to a "reasonable possibility" test because it is an objective standard. Contrary to respondents' suggestion, however, the reasonable-possibility standard is itself an objective test and does not, as respondent suggests, "require the circuit judges to be clairvoyant or attempt to enter the jurors' minds." *Ibid.* Instead, it requires (at a minimum) a "plausible explanation as to how relevant pre- and post-enactment conduct differed, thereby demonstrating a reasonable possibility that the jury might have convicted [the defendant] based exclusively on pre-enactment conduct." Pet. App. 14a (concurring opinion). Requiring reversal whenever there is any theoretical possibility of prejudice—no matter how remote—does not make the plain-error inquiry any more objective; it simply results in reversal of convictions because of unpreserved errors that did not affect the outcome of the proceedings.

3. Respondent offers two additional reasons to bolster his claim that the error in this case necessarily affected his substantial rights and seriously affected the fairness, integrity, and public reputation of judicial proceedings. First, he asserts (Br. 20) that because the indictment referred to a period of time when, "as a matter of law, there could be no offense, the entire indictment is radically flawed" (emphasis omitted). That claim lacks merit. To the extent that respondent's crimes constituted continuing offenses, the indictment could properly charge a period of time that spanned the enactment of the statute. The only ex post facto requirement is that the jury find that at least one of the acts constituting the offense took place after the statute's effective date. Gov't Br. 17 n.4. In any event, if an indictment contains a flawed or unsupported theory, the error does not automatically vitiate the entire indictment. So long as the indictment contains a valid theory, the invalid part may be disregarded as "surplusage." *United States* v. *Miller*, 471 U.S. 130, 137 (1985) (quoting *Ford* v. *United States*, 273 U.S. 593, 602 (1927)). Here, the district court could have cured any overbreadth in the indictment's coverage of pre-enactment conduct by instructing the jury that it had to find that respondent's conduct, alleged to have begun in January 1999, continued past October 28, 2000. But respondent did not object to that omission.

Second, respondent argues (Br. 20) that upholding a conviction without "advance notice of what conduct is to be avoided" would "shatter[]" public confidence in the judicial system. But respondent overlooks that his trial also involved conduct that took place after enactment of the sex-trafficking and forced-labor statutes, at a time when he had ample notice of "what conduct [was] to be

avoided." *Ibid.* To the extent that the record reveals no reasonable possibility that the jury relied only on the pre-enactment conduct, it is the reversal of his conviction that would shake public confidence in the judicial system. See *Johnson*, 520 U.S. at 470 ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.") (quoting Roger J. Traynor, *The Riddle of Harmless Error* 50 (1970)); see also *Puckett* v. *United States*, 129 S. Ct. 1423, 1428 (2009).

4. Respondent also suggests (Br. 34) that the court of appeals should be permitted to develop its own approach to plain-error review because, he says, the application of Rule 52(b) "does not require a uniform national solution." He relies on *Ortega-Rodriguez* v. *United States*, 507 U.S. 234 (1993), in which this Court stated that courts of appeals could adopt different rules governing the dismissal of appeals by fugitives. But in that case, the Court emphasized that the Federal Rules of Appellate Procedure—which did not address the subject at all—did not "mandate[] uniformity among the circuits in their approach to fugitive dismissal rules." *Id.* at 251 n.24. Plain-error review, by contrast, is governed by Federal Rule of Criminal Procedure 52(b), and there is no basis for reading that rule to mean one thing in some circuits and something else in others. And none of this Court's cases construing Rule 52(b) has suggested that courts of appeals are free to disregard this Court's application of plain-error review and develop their own standards. Respondent's invitation to create a balkanized system of plain-error review that varies from circuit to circuit should therefore be rejected.

B. No Special Rule Of Plain-Error Review Should Govern Forfeited Ex Post Facto Errors

The effect of the decision below is to create a special rule of plain-error review for forfeited errors involving the Ex Post Facto Clause. As explained in the opening brief (at 19-20), the decision appears to have been based on pre-*Olano* circuit precedent, rather than on a desire to create a special rule for ex post facto claims. Thus, the court of appeals made no effort to explain why ex post facto errors should be treated differently from other kinds of errors. Respondent offers several arguments for treating ex post facto claims differently, but none is persuasive.

1. Respondent emphasizes (Br. 15-18) that the Ex Post Facto Clause embodies fundamental constitutional principles. That is undisputed, but as this Court explained in *Johnson*, "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." 520 U.S. at 466. Accordingly, the Court in that case applied plain-error review to a violation of the Sixth Amendment's requirement that the jury find every element of the offense. *Id.* at 465-466. Similarly, the Court has applied plain-error review to violations of the Fifth Amendment grand-jury right, which "serves a vital function" and "acts as a check on prosecutorial power." *United States* v. *Cotton*, 535 U.S. 625, 634 (2002). It has also applied plain-error review to errors involving Federal Rule of Criminal Procedure 11—the rule that protects *all* of a defendant's trial rights by ensuring that a guilty plea, which waives those rights, is knowing and voluntary. *United States* v. *Vonn*, 535 U.S. 55, 58-59 (2002). The concurring judges in the court of appeals correctly observed that, "[w]hile the Ex Post Facto

Clause is certainly fundamental to our notions of justice, it is no more so than the Fifth and Sixth Amendment rights at issue in *Johnson* and *Cotton*." Pet. App. 13a (citation omitted).

Respondent contends (Br. 19) that (assuming that the charged crimes were not continuing offenses)the error in this case was particularly harmful because the government presented evidence relating to pre-enactment conduct, and therefore "massive amounts of highly volatile, prejudicial and cumulative evidence infect[ed] every aspect of the trial." But petitioner did not object to the admission of evidence of pre-enactment conduct. For that reason, any claim of error in the admission of such evidence would itself be subject to plain-error review, and it is far from plain that the admission of that evidence was erroneous. Evidence of respondent's pre-enactment threatening and "punishment" of his victim, for example, was admissible to establish that when he obtained her labor in the post-enactment period, he did so by "threats of serious harm." 18 U.S.C. 1589(1); see, *e.g.*, *United States* v. *Smith*, 464 F.2d 1129, 1134-1135 (2d Cir.), cert. denied, 409 U.S. 1023 and 409 U.S. 1076 (1972); *United States* v. *Annoreno*, 460 F.2d 1303, 1307 (7th Cir.), cert. denied, 409 U.S. 852 (1972). In any event, even if the admission of evidence of pre-enactment conduct might be prejudicial in some cases, that is not a reason for dispensing, in every case, with the requirement that the defendant establish prejudice.

2. Respondent asserts (Br. 20) that the error in this case was jurisdictional. If that were true, it would make plain-error analysis inapplicable: a party may not waive a lack of subject-matter jurisdiction, and therefore "defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district

court." *Cotton*, 535 U.S. at 630. But the error in this case was not jurisdictional.

According to respondent (Br. 20), "federal courts have *no jurisidiction* to prosecute an individual for behavior that, at the time it was undertaken, violated no federal law." That argument rests on an erroneous and overly expansive concept of jurisdiction. This Court has explained that "jurisdiction," properly understood, refers to "the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co.* v. *Citizens for Better Envt.*, 523 U.S. 83, 89 (1998). In this case, the district court's jurisdiction was based on 18 U.S.C. 3231, which vests the district courts with original jurisdiction over "all offenses against the laws of the United States." As relevant here, the indictment charged that respondent violated 18 U.S.C. 1589 in that he "did knowingly and intentionally provide and obtain, and attempt to provide and obtain, the labor and services of a person * * * by threats of serious harm to, and physical restraint against, that person" as well as through a scheme "intended to cause that person to believe that, if the person did not perform such labor and services, the person would suffer serious harm and physical restraint, which offense included aggravated sexual abuse." Superseding Indictment 2. Because the indictment alleged an "offense[] against the laws of the United States," the district court had subject-matter jurisdiction under Section 3231.

Respondent is correct that (assuming that the charged crimes were not continuing offenses) the indictment contained an error: the charged conduct occurred "[i]n or about and between January 1999 and October 2001," Superseding Indictment 2, but Section 1589 was not enacted until October 2000, see Victims of Traffick-

ing and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464. Accordingly, the indictment should have been restricted to the period between October 2000 and October 2001. But this Court has expressly held that "defects in an indictment do not deprive a court of its power to adjudicate a case" and therefore are not jurisdictional errors. *Cotton*, 535 U.S. at 630. "[T]he objection that the indictment does not charge a crime against the United States goes only to the merits of the case." *Id.* at 631 (quoting *Lamar* v. *United States*, 240 U.S. 60, 65 (1916) (Holmes, J.)). Accordingly, the error in this case did not affect the jurisdiction of the district court.

3. Respondent next argues (Br. 28) that he need not show prejudice because the error in this case was a "structural" error. That is incorrect. This Court has defined "structural errors" as those fundamental errors that "affect[] the framework within which the trial proceeds." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991). When properly preserved, a structural error results in reversal without any analysis of prejudice. But on plain-error review, a forfeited claim of structural error does not automatically result in reversal. The Court has reserved the question whether structural errors automatically affect substantial rights, thereby satisfying the third prong of plain-error review. *Puckett*, 129 S. Ct. at 1432. But even when a forfeited error is assumed both to be structural and to affect substantial rights, the defendant still must demonstrate prejudice in order to satisfy the fourth prong of the *Olano* test by showing that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 469-470.

In any event, the error in this case was not structural. This Court has "found structural errors only in a very limited class of cases." *Johnson*, 520 U.S. at 468; see *id.* at 468-469 (citing cases). "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose* v. *Clark*, 478 U.S. 570, 579 (1986). In particular, the omission of one element of the offense from a jury instruction is not a structural error. *Neder*, 527 U.S. at 8-9. The error in this case was analogous: the jury instructions were flawed because they did not inform the jury that it could not convict unless it found unlawful conduct occurring after October 2000. If any rational jury that convicted would in fact have found conduct after October 2000, there would be nothing fundamentally unfair about the conviction. The error was therefore not a structural error.*

4. Finally, respondent asserts (Br. 30) that "[o]ther circuits have endorsed the Second Circuit's objective approach" to plain-error review of ex post facto claims. In support of the proposition, he relies only on *United States* v. *Tykarsky*, 446 F.3d 458 (3d Cir. 2006). In that case, the defendant was convicted of violating 18 U.S.C. 2422(b) by attempting to persuade, induce, entice, or coerce an underage person to engage in illegal sexual activity through the Internet. The evidence consisted of a series of emails and instant-messenger conversations, some of which pre-dated and some of which post-dated

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* Respondent does not take issue with the government's suggestion (Gov't Br. 16-17) that the error is properly viewed as a due process rather than ex post facto error. In any event, the analysis is the same: neither form of error is structural when the error arises because of overbroad jury instructions.

an amendment to the statute that imposed a higher mandatory minimum sentence. On plain-error review, the court of appeals held that the defendant could not be subject to the increased mandatory minimum because there was a "possibility that a reasonable jury could have convicted" based solely on the pre-amendment communications. 446 F.3d at 481. But in stating the test for plain-error review, the court of appeals explained that the defendant "has been prejudiced if there is a *reasonable possibility* that a jury, properly instructed on this point, might have found [him] guilty based exclusively on acts that occurred before the increased penalty took effect." *Id.* at 480 (emphasis added). That test is consistent with this Court's cases and inconsistent with the decision below.

Respondent also cites (Br. 32-33) a series of cases involving the right of allocution at sentencing. In some of those cases, the courts of appeals stated that a defendant could establish prejudice from a deprivation of the right of allocution by showing a possibility of a reduced sentence. Those cases are of limited relevance, not only because they involved an error significantly different from that at issue here, but also because the courts did not focus on the distinction between a possibility and a reasonable possibility. In any event, the court in one of the cited cases ultimately denied relief under the fourth prong of *Olano* after conducting the sort of case-specific inquiry that the court of appeals failed to conduct in this case. See *United States* v. *Pitre*, 504 F.3d 657, 663 (7th Cir. 2007) (concluding that, "on the facts of this case," the district court's failure to grant the defendant her right to allocute "did not affect seriously the fairness, integrity or public reputation of her revocation proceedings").

C. This Court Should Remand To Allow The Court Of Appeals To Apply The Correct Standard Of Plain-Error Review

Because the court of appeals erroneously believed that any possibility of prejudice was sufficient to require reversal, it did not address the question required by the plain-error standard: whether there was a reasonable possibility that the jury convicted based solely on pre-enactment conduct. Respondent argues (Br. 35) that the error in this case was prejudicial because "there were significant differences between the pre-enactment and post-enactment evidence." The court of appeals did not have an opportunity to consider that argument under a correct standard of plain-error review, and there is no reason for this Court to consider it in the first instance. In any event, the argument lacks merit.

1. Recognizing that it is "a court of review, not of first view," this Court generally declines to resolve issues that were not passed upon below. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); see *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001). Respondent offers no reason why the Court should deviate from that practice in this case. To the contrary, adherence to the Court's usual practice is particularly appropriate here in light of the fact-intensive nature of respondents' arguments. Accordingly, after holding that this case is governed by ordinary plain-error principles and that those principles require a showing of prejudice in order for a defendant to obtain reversal based on a forfeited claim of error, this Court should remand to allow the court of appeals to apply the plain-error standard in the first instance.

2. If the Court does consider the merits of respondents' case-specific arguments, it should reject them. Respondent offers three reasons why, in his view, there is a reasonable possibility that the error in this case affected the outcome of his trial. None withstands scrutiny.

First, respondent points out (Br. 35) that the pre-enactment labor of his victim, Jodi, consisted of creating a website, while her post-enactment labor involved maintaining the website by "upload[ing] photographs and click[ing] on certain links." The concurring judges in the court of appeals noted that distinction and correctly observed that it was "immaterial for purposes of the forced-labor statute." Pet. App. 17a n.6. That statute prohibits obtaining "the labor or services of a person" by threats of serious harm or physical restraint. 18 U.S.C. 1589. Respondent identifies no reason why creating a website would be considered "labor or services" but maintaining one would not.

Second, respondent notes (Br. 36) that, shortly after the statute was enacted, Jodi began a full-time job, and therefore, he reasons, the jury might not have believed that she continued to work on the website. But Jodi had also been employed during portions of the pre-enactment period charged in the indictment, see Tr. 97, 294, and in any event, working at a full-time job is not incompatible with working on a website at home. More importantly, there was considerable evidence that, even in the post-enactment period, respondent continued to coerce Jodi and to punish her for unsatisfactory work on the website. Indeed, as the concurring judges on the court of appeals pointed out, "one of the most severe punishments [respondent] imposed on Jodi for her work on the website occurred in April 2001." Pet. App. 17a n.5; see

id. at 28a (describing incident). The Ex Post Facto Clause and the Due Process Clause require only that at least one act constituting the offense take place after the statute's effective date. See Gov't Br. 17 n.4. There is no reasonable possibility that the jury believed that Jodi performed forced labor before October 2000 but performed no acts of forced labor at all after the statute was enacted.

Third, respondent observes (Br. 36) that the pre-enactment period charged in the indictment was nearly twice as long as the post-enactment period. But given the similarity of respondent's conduct during the two periods, the relative length of the periods provides no reason for concluding that the jury would have convicted based solely on pre-enactment conduct.

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For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

ELENA KAGAN
Solicitor General

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